

**RIGHTS OF THE CITIZEN UNDER
THE CONSTITUTION AND LAW**

F. K. M. A. MUNIM



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By

F. K. M. A. MUNIM, M.A., LL.M., PH.D.,
of the Lincoln's Inn, Barrister-at-Law,
Judge, Supreme Court of Bangladesh.

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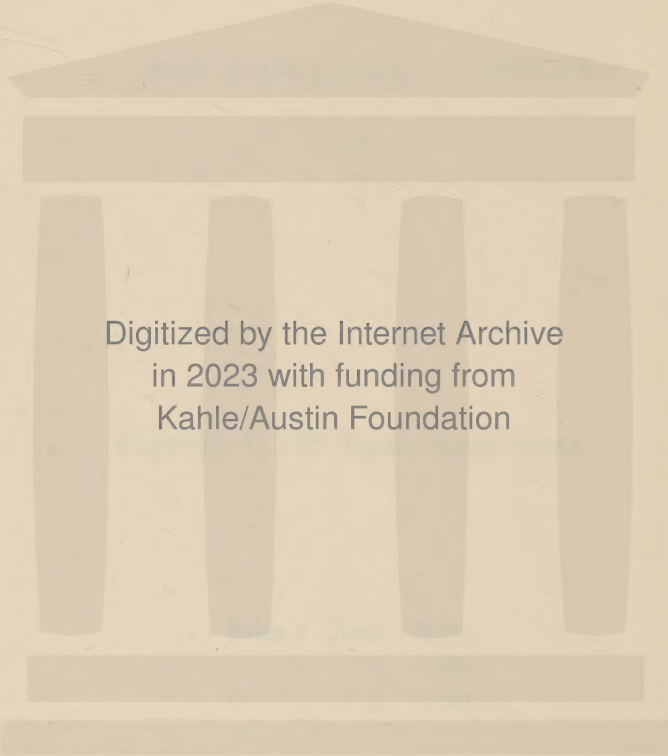
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To My Parents



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PREFACE

Nearly twenty years have passed since I first had the opportunity to study the citizen's rights as guaranteed by the Constitution of Pakistan, 1956, when I was preparing my thesis on '*Fundamental Rights in Pakistan*' for submission to the University of London. Subsequently the opportunity to publish a book on the citizen's rights came after fundamental rights were incorporated into the Constitution of Pakistan, 1962 by the Constitution (First Amendment) Act, 1963, but it was soon lost for reasons which are now well-known. The political and constitutional developments in Pakistan not only led to the abrogation of the Constitution of Pakistan, 1962 but eventually resulted in the dissolution of the State. With the emergence of Bangladesh in 1972 yet another opportunity came to study the citizen's rights from the view-points of the Constitution-makers, for, as Secretary to the Ministry of Law and Parliamentary Affairs I was associated with the drafting of the present Constitution of Bangladesh. Though as a judge I was required to administer the rights declared under the Constitution and not give my opinion on them in a book, I must confess my inability to resist the temptation to do so for the simple reason that I could not overcome my past frustration in not being able to publish the book and also the eagerness to make known the results of my continued study of these rights for a considerable length of time.

As one who is acquainted with the constitutional developments in this country as well as the country of which it once formed part in the past would expect, I had to draw heavily from cases decided under the past Constitutions which governed this country as well as constitutions of other countries guaranteeing similar rights. In utilising the method of comparative study and the very little spare time I had at my disposal, I proceeded to re-write my thesis. I am not entirely satisfied with the results of my

attempt, but hope to derive satisfaction and encouragement from the thought that nobody else here has done any substantial work in this field. In spite of using different sources I have endeavoured to maintain the unity of concept in discussing these rights. If the readers, whether they be students or lawyers, get even a little glimpse into the nature and meaning of the rights guaranteed by the Constitution, I would feel compensated for the energy I have spent and be grateful if they would forgive whatever imperfections the book contains. After they have gone through the book, I am sure, they would know that so far as the rights are concerned, the last words have not been said about them. Like every other living organism, these rights will, it is hoped, grow and assume more developed and beautiful shape and form in future years, but for the present, as is the case with a sapling, these rights would, I am afraid, require tender care and nurture. Remembering the developing stages through which this society is passing, we can only hope that the rights deserve more than usual sympathy and consideration lest they perish at the end. One can hardly forget that perfection comes not through logic but trial, error and experience.

The arrangement of the book is quite simple. The first two chapters deal with a few preliminary things, such as the importance of the rights, the historical background, the nature and scope of the rights and the problems arising out of any conflict between the rights and any legislative or executive actions. The other chapters have been organised according to the significance of the rights. Ordinarily, the chapter on rights to property should have come immediately after the one on liberty, but in view of the relative unimportance of these rights the last but one chapter has been devoted to their consideration.

In acknowledging my gratitude, let me first recall my indebtedness to my former tutor, Professor Alan Gledhill of the University of London, who has since retired, under whose able guidance and help I prepared my thesis which I have utilised as nucleus in writing this book. I owe and gratefully acknowledge the special encouragement I had always received from Dr. Kamal Hossain, Chairman of the Bangladesh Institute of Law and International

Affairs, to have this book published. I cannot fail to mention the most practical help I received from Mr. M. H. Khondker, the former Attorney-General, who kindly went through the typescript of the book and made valuable suggestions for its improvement. I will be failing in my duty if I do not mention the facilities which were extended to me by Mr. K. A. A. Quamruddin, Director of the Bangladesh Institute of Law and International Affairs, in lending materials and also in undertaking the publication of the book and also thank the other members of the staff of the Institute.

10 Minto Road

Dacca

June, 1975.

F. K. M. A. Munim

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CHAPTER ONE

INTRODUCTION

Importance of Fundamental Rights and Fundamental Freedoms

Within less than a year after the emergence of Bangladesh as a new, independent, sovereign republic, the Constitution of Bangladesh was passed, though, however, it came into force on December 16, 1972, the first anniversary of the Day of Liberation. The framers of the Constitution showed concern for the necessity of protecting human rights and ensuring fundamental freedoms. In the Preamble they declared that "it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation—a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens." Besides, they inserted Part II and Part III into the Constitution which contain "Fundamental Principles of State Policy" and "Fundamental Rights" respectively. The principles contained therein are designed to declare and at the same time protect the freedoms to be enjoyed by the people.

The principles declared in Part II are not judicially enforceable, but those enunciated in Part III aim to provide limitations on the executive as well as the legislative powers of the State and are, therefore, made enforceable in a court of law. Otherwise, they realised, the State would perhaps interfere with the individual freedom of its citizens in such a manner as to amount to a virtual negation of the guaranteed freedoms. A faith in democracy did not lead them to entertain distrust of the effectiveness of a declaration of such rights in the Constitution or the role of the judges in interpreting them. They knew that "a Bill of Rights itself implies that government cannot be left

entirely to the instincts of legislators or preserved by a faith in democratic majority judgment.”¹

By the incorporation in the Constitution of such “fundamental rights” as personal liberty, equality before the law, freedom of speech and expression, freedom of assembly and association, freedom of movement and residence, freedom to hold and deal with property, and freedom of religion they attempted to impose restrictions on the uncontrolled power of the State in the fields where individual liberty seemed most desirable, and to prohibit variations of these rights except by the comparatively difficult process of amending the Constitution.

They recognised, however, that even in normal times, it was impossible to guarantee these liberties absolutely and without restrictions. The Constitution is, therefore, seen to indicate with more or less precision depending on the nature of the right the constitutionally permissible restrictions upon the fundamental rights. They are invariably restricted, expressly or impliedly, by such concepts as “subject to law, public order and morality”, “save in accordance with law” or “subject to any reasonable restrictions.”

Earlier Declarations of Rights

Formulations of natural rights began from the middle of the eighteenth century. An early attempt to record some rights in a written document was made in the American Declaration of Independence. (1776) :

“We hold these truths to be selfevident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights ; that among these are life, liberty, and the pursuit of happiness ; that to secure these rights, governments are instituted among man deriving their just powers from the consent of the governed.....”

The French Declaration of the Rights of Man promulgated by the Assembly of 1789 prefaced the Constitution of 1791. It contained a set of fundamental or natural rights which proclaimed liberty of conscience, liberty of the press, the right of public meeting and the responsibility of government officials. These

¹ Geoffrey Marshall, *Constitutional Theory*, (1971)

are still regarded by the French constitutional lawyers as valid, "either as principles of natural law, or as essential principles of political action in a free and democratic country." In dealing with the problem of a declaration of rights the framers of the Constitution of the Fifth French Republic placed it in the Preamble to the Constitution and were satisfied by proclaiming "their attachment to the Rights of Man and the Principles of National Sovereignty."

The Declarations in both America and France were founded essentially upon English traditions :

"The historical origins of some of the most famous declarations of individual rights are traceable to sources that lie in Anglo-Saxon attitudes. The American revolutionaries drew inspiration for their new State Constitutions from ideals thought to be implicit in Magna Carta, the Petition of Right, 1628 and from concepts of fundamental law and natural rights expressed in the writings of Coke, Locke, and the polemicists of the Puritan Revolution. The content of those State Constitutions materially influenced the wording of the Declaration of Independence and the American Bill of Rights. The French Declaration of the Rights of Man owed as much to Tom Paine as to any other author."²

The Irish Constitution of 1937 contains declarations of fundamental rights. Article 40 of that Constitution declares equality before the law, the guarantee to vindicate personal rights, personal freedom, free expression of convictions and opinions, the right of peaceable assembly and association. Article 42 guarantees rights to education. Article 43 protects rights to private property. Article 44 (2) includes freedom of conscience and the free expression and practice of religion. The Indian and Bangladesh Constitutions have also, in following the Irish Constitution, made a clear cut separation of fundamental rights from directive principles.

Freedom from discrimination, the right to personal liberty, freedom of expression, assembly, association, residence, to acquire property and to follow an avocation, freedom of conscience, protection against expropriation without compensation are all

² S. A. De Smith, Fundamental Rights in the New Commonwealth, *The International and Comparative Law Quarterly*, Vol. 10, 1961.

guaranteed by the Burma Constitution of 1948, which also provides for the enforcement of these rights by the English prerogative writs.

The Constitution of Canada, Australia and Union of South Africa, being Acts of British Parliament, do not provide any 'comprehensive statement of human rights.' Their resemblance in this respect to the United Kingdom Constitution is quite obvious. They follow the British pattern insofar as they neither affirm nor guarantee the liberties of the subject. Many of the new and newly emerging states in Africa and elsewhere are seen to have guaranteed some fundamental rights in their constitutions.

In 1948 a Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations :

"The Universal Declaration of Human Rights did not, however, profess to define those rights in terms appropriate to their application by courts. They were stated in general terms, without qualification, except that they might be restricted to protect the rights of others; they were 'common standard of achievement', which all nations were 'to promote.....by progressive measures'."³

Several authors of international repute have discussed the problem whether the United Nations Charter has put any legal obligations on the Member states to respect human rights and fundamental freedoms.⁴ The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome on November 4, 1950. The latter provided

³ Alan Gledhill, *Fundamental Rights in India*, 1956. The legal effect of the Declaration is reflected in what Mrs. Roosevelt, Chairman of the Human Rights Commission, stated about it, "In giving our approval to the Declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty. It is not an international Agreement. It is not and does not purport to be a statement of law or of legal obligation.

It is a Declaration of basic principles of human rights and freedoms stamped with the approval of the General Assembly by formal votes of its principles and to serve as a common standard of achievement for all peoples of all nations."

⁴ H. Lauterpacht, *International Law and Human Rights*; Hans Kelsen, *The Law of the United Nations*.

that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of this convention." These rights are a more detailed version of those contained in the Universal Declaration of Rights, 1948.

The English Experience

There is, however, no guarantee of fundamental rights in the English Constitution. As Lord Wright observed, "The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved."

Though there is no foundation of citizens' rights in the English Constitution, these have been secured by judicial decisions and various statutes passed by the Parliament. Magna Carta (1217), the Petition of Rights (1628) and the Bill of Rights (1689) proclaim principles similar in nature to the fundamental rights. As Dicey said, "The Petition of Rights and the Bill of Rights, contain, it may be said, proclamations of general principles which resemble the declarations of rights known to foreign constitutionalists and especially the celebrated Declaration of the Rights of Man of 1789."

But, according to Dicey, "the Petition of Rights and the Bill of Rights are not so much declarations of rights in the foreign sense of the term, as Judicial condemnations of claims or practices on the part of the Crown, which are thereby pronounced illegal. It will be found that every, or nearly every clause in the two celebrated documents negatives some distinct claim made and put into force on behalf of the prerogative."⁵

Similarly, almost invariably the fundamental rights provided in a written constitution aim to restrict and control the unfettered power of the Executive or the legislature to curb the liberty of the subject.

Doubts have been expressed as to whether the declaration of certain fundamental liberties in a Constitution is a sufficient safeguard against future legislative or executive encroachments,

⁵ A. V. Dicey, *Law of the Constitution*, 10th Edition, at p. 200 (1964).

and, therefore, whether something more is necessary for that purpose. As Dicey has said, while referring to his experience of Belgian and French constitutions and their working, "the question whether the right to personal freedom or the right to freedom of worship is likely to be secure does depend a good deal upon the answer to the enquiry whether the persons who consciously or unconsciously build up the Constitution of their country begin with definitions or declarations of rights or with the contrivance or remedies by which rights may be enforced or secured." According to him, the constitutionalists in those countries, while occupied in defining rights had given "insufficient attention to the absolute necessity for the provision of adequate remedies by which the rights they proclaimed might be enforced."

On the other hand, though "there is in the English Constitution an absence of those declarations of rights so dear to foreign constitutionalists," in the opinion of Dicey, "there runs through the English Constitution that inseparable connection between the means of enforcing a right and the right to be enforced which is the strength of Judicial legislation." He said that "in England the so called principles of the Constitution are inductions or generalisations based upon particular decisions pronounced by the courts as to the rights of given individuals." In the same vein a distinguished writer, while commenting on Dicey's declaration that the Habeas Corpus Acts were "for practical purposes worth a hundred articles guaranteeing individual liberty," stressed the difference in attitude of the English people in this respect:

"The English lawyer finds political manifestos out of place in a legal document, particularly when their philosophical foundations are insecure. He instinctively prefers brass tacks to noble phrases, pragmatism to metaphysics, and obstinately insists that the proof of the pudding is in the eating. Nor is he in the least impressed by the history of liberty in the majority of countries which have had constitutional declarations or guarantees of rights. Above all, there is the natural tendency to feel that lessons drawn from one's own experience have universal validity."⁶

⁶ S. A. De Smith, *Fundamental Rights in the New Commonwealth. The International and Comparative Law Quarterly*, Vol. 10, 1961, at pp. 86-87-

In referring to a number of things which "have militated against the protection of civil liberties by any formal consolidation or declaration of constitutional rights" another well-known author remarked, quite aptly, that "there exists in Britain, in both political and judicial circles, a reluctance to see the judiciary saddled or entrusted with wide issues of policy such as are involved in concepts of 'due process', 'equal treatment' or abstract freedoms enunciated in the traditional type of Bill of Rights."⁷ He, therefore, expressed the hope that Englishmen will no longer be faced with a choice between 'the might of Leviathan (and) isolated strong points labelled "fundamental rights".'

The American Bill of Rights

In the United States of America, as the government was considered to be one of enumerated powers, the framers of the Constitution did not feel it necessary at first to declare the fundamental rights. For, if the powers that were conferred did not authorise the government to do something, for example, depriving the subject of any fundamental right, it was thought unnecessary to restrain its hands from assuming such powers. The mere want of provisions enabling the government to exercise them was enough. No less a voice than that of Mr. Hamilton was heard to speak in favour of such argument. But contrary opinion was held by others.⁸ On their persistent demand for the inclusion of a Bill of Rights in the Constitution the Congress at last had to yield.

The first ten amendments to the United States Constitution proposed and accepted by the Congress in 1791, known as the American "Bill of Rights", along with other provisions of the

⁷ Geoffrey Marshall, *Constitutional Theory*, (1971)

⁸ "Jefferson, the spiritual father of the Bill of Rights, and Madison, the astute politician who steered the Bill of Rights through Congress, were of a different school of thought. They recognised the risk of tyranny of the majority. But they had confidence in popular rule and confidence in a Bill of Rights as a restraint on 'the tyranny of the legislatures' and as an aid to the judiciary in preventing encroachments on the liberty of the citizen."—William O. Douglas, *The Right of the People*.

Constitution itself and other amendments, converted the natural and inalienable rights into rights recognised by the positive law and sought to protect them particularly against the government. Ever since the insertion of these provisions in the Constitution it has become the duty of the Supreme Court of the United States to interpret them whenever disputes arose regarding their scope and meaning. Fundamental rights were declared also in the constitutions of the States.

These amendments to the United States Constitution include the freedom of speech and the press, peaceable assembly, petition for redress of grievances and free exercise of religion (First Amendment); security of persons, houses, papers and effects from unreasonable searches and seizures (Second Amendment); no deprivation of life, liberty or property without due process of law (Fifth Amendment); and freedom from excessive bail or fines and from cruel or unusual punishments (Eighth Amendment). The American Constitution had already provided against the suspension of the writ to *habeas corpus*; the passing of any *ex post facto* law and trial of crimes, except in cases of impeachment without jury.

Fundamental Rights in the Indo-Pakistan-Bangladesh Sub-Continent

In British India, notwithstanding pressure from Indians, the Constitution Acts enacted by the Parliament of the United Kingdom did not contain a declaration of fundamental rights as such, though they guaranteed a few rights.

The Proclamation of Queen Victoria on November 1, 1858, laid down the State Policy in certain matters as follows :

1. It declared the secular nature of the State and the principle of non-interference with the citizens' religious faith and observances.
2. It declared the freedom of religious faith and worships.
3. It assured the right to private property particularly in land.
4. It declared impartiality in the matter of appointment to public services.
5. It proclaimed the equal protection of law.

But as the Proclamation merely contained a declaration as to State policy, the principles enunciated therein were not enforceable in Courts. The origin of this guarantee is traceable to the Charter Act of 1833.

Section 96 of the Government of India Act, 1915, guaranteed equality of opportunity in the public services, regardless of race or religion. The Government of India Act, 1935, went further. It imposed in Sections 275 and 297 to 299 some restrictions on executive and legislative action forbidding discrimination, which are comparable with the fundamental rights, for they could be enforced, even against a statute by the Courts.⁹ Needless to say, no Constitutional remedy was provided to enforce such rights.

When, after nearly 200 years, the British rule in India came to an end in 1947, two independent states of India and Pakistan were created. Two separate Constituent Assemblies were set up for each of these countries. The Constituent Assembly of Pakistan which was set up by the Governor-General of India, Lord Mountbatten, by his announcements of 22nd July and 10th August, 1947, failed to prepare a Constitution for Pakistan even at the end of 1954. It was eventually dissolved by a proclamation issued by the Governor-General of Pakistan on the 24th October, 1954. A series of Constitutional cases started on the dissolution of the Assembly.¹⁰ As a result of a decision of the Federal Court of Pakistan the second Constituent Assembly of Pakistan was set up.¹¹ This Assembly which first met at Murree in West Pakistan on July 5, 1955, assumed the task of preparing a Constitution for the country. On January 8, 1956, the new Constitution Bill inclu-

⁹ *Punjab v. Doulat Sing*, AIR 1946 PC 66.

¹⁰ *Federation of Pakistan and Others v. Moulvi Tamizuddin Khan*, PLD 1955 FC 240 ; *Usif Patel and Two Others v. The Crown*, PLD 1955 FC 387; *Reference by H. E. the Governor-General*, PLD 1955 FC 435; *Federation of Pakistan v. Ali Ahmad Hussain Shah and the Union of India*, PLD 1955 FC 522.

¹¹ *Usif Patel and Two Others v. The Crown*, PLD 1955 FC 387. These cases have been discussed in *Constitutional Problems in Pakistan*, 1957 by Sir Ivor Jennings and *Constitution of Pakistan*, 1965 by Muhammad Munir.

ding the Fundamental Rights was published. After a few amendments the Bill was passed on February 17, 1956, and came into force on March 23, 1956.

The Interregnum

This Constitution, however, stood abrogated on October 7, 1958, when Major-General Iskender Mirza, the then President of Pakistan, made "a clean sweep" of the country's Constitution, Government, Assemblies and political parties. The abrogation of the two-year old Constitution was simultaneously followed by the handing of supreme power to General Mohammad Ayub Khan, the then Commander-in-Chief, and the imposition of Martial Law throughout Pakistan. Pursuant to the Proclamation of October 7, 1958 abrogating the Constitution and assuming supreme powers President Mirza promulgated the Laws (Continuance in Force) Order, 1958. It was deemed to take effect immediately and extended to the whole of Pakistan.

In a case which immediately came up for consideration before the Supreme Court of Pakistan, the question was whether the impugned Frontier Crimes Regulation violated the provisions in the old Constitution of 1956 guaranteeing Fundamental Rights.¹² Muhammad Munir CJ categorically denied that the fundamental rights as guaranteed by the late Constitution still existed or that the Court had power to issue a writ on the ground that any of those rights were infringed.

Like the other constitutional provisions they were swept away by the provisions of Article IV of the Laws (Continuance in Force) Order, 1958. After explaining the discrepancy between this Article and Article II of the same Order, he expressed the opinion that the fundamental rights did no longer exist and the latter Article did not have the effect of restoring fundamental rights.

After continuation of martial law for a period of nearly four years President Muhammad Ayub Khan promulgated a Constitution on March 1, 1962, the day on which the National Assembly elected under its provisions met for the first time. It, however,

¹² *The State v. Dosso*, PLD 1958 SC 533.

omitted to include fundamental rights as were provided in the 1956 Constitution, but instead incorporated certain similar principles known as the "principles of law-making". These principles differed from fundamental rights because they could not be enforced in a court of law. The chapter on fundamental rights was inserted in the Constitution by the Constitution (First Amendment) Act, 1963 which received the assent of the President on January 7, 1964. This amendment conferred fundamental rights on the citizen and also gave him a right to approach the Courts for the enforcement of such rights.

This Constitution, like that of 1956, was shortlived and was abrogated on March 23, 1969. President Ayub Khan stepped down handing over power to General Muhammad Yahya Khan, the Commander-in-Chief of Pakistan, who promulgated the Provisional Constitution Order on April 4, 1969. As the subsequent events proved Muhammad Yahya Khan seemed to be incapable of solving the constitutional and political problems of the country. Eventually, under the Legal Framework Order, 1970 he ordered a general election throughout the country on December 7, 1970 for electing representatives to the National Assembly of Pakistan which were to frame a Constitution for the country. Due to his failure to respect the verdict of the people in allowing the Constituent Assembly to meet and draw the Constitution and his thoughtless resort to military action against the unarmed people of Bangladesh (then East Pakistan) the war of liberation started and the Proclamation of Independence was made on March 26, 1971. The war which lasted for 9 months ended on December 16, 1971, with the surrender of the Army of Occupation to the Combined Forces of India and Bangladesh. Bangladesh emerged as a new, independent State with the dissolution of the former State of Pakistan.

On March 22, 1972, a new Constituent Assembly was set up under the Constituent Assembly of Bangladesh Order, 1972 to frame a Constitution for the Republic. On April 10, 1972, the Assembly constituted a Drafting Committee consisting of thirty-four members to prepare and draft a Constitution.

On November 4, 1972, the Assembly, after considering the Draft Constitution presented to it by Dr. Kamal Hossain, then Law Minister, passed the Constitution of Bangladesh. On December 16, 1972, the day on which Bangladesh emerged as a separate independent State the previous year, Members of the Assembly formally signed the Constitution and on the same day it came into effect.

Scope of the Fundamental Rights in Bangladesh

The Fundamental Rights which have been incorporated in the Constitution have, in spite of their resemblance to those in the Constitutions of Pakistan, 1956 and 1962, their own distinct character. Though some of them have retained their similarity to, others are differently worded and have made a complete departure from, those contained in the aforesaid Constitutions.

Each of the Fundamental Rights will be considered separately, and in some detail in later chapters, so that only a brief estimate of their scope and effectiveness, regarded as a whole, will be attempted here. It must be remembered that whereas these rights are mostly available to citizens only, some of them may be invoked by non-citizens also, i.e. all persons residing within the State on whom the laws of Bangladesh operate.

The right to equal protection of the law, freedom from punishment under an *ex post facto* legislation the religious safeguards in educational institutions and the freedom of thought and conscience are stated in absolute terms without reference to restrictions. But all the other rights are set out in language which provides for their restrictions. Such phrases as "save in accordance with law", "reasonable restrictions" and "subject to law, public order and morality" have been used to qualify the absoluteness of the words granting these rights.

Two rights, it may be observed, have suffered diminution, if not total eclipse. These are rights relating to property and the right to carry on any lawful trade or business. Any restrictions may be imposed upon the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business.¹³

¹³ Article 40.

Similarly, the right to acquire, hold, transfer or otherwise dispose of property may be subjected to any restrictions.¹⁴ Such a phrase as “reasonable” qualifying the expression “restrictions” used in respect of other rights having been omitted insofar as these rights are concerned is likely to have a disabling effect on the Court’s power to intervene even if restrictions with regard to any such rights would appear to be grossly unreasonable.

Sometimes the judges will undoubtedly be confronted with difficulties in interpreting the words qualifying the rights which leave considerable room for legitimate difference of opinion. In interpreting the scope of the restrictions placed upon them, the Court will be faced with the problem of constantly balancing the interests of the individual against the collective interests of the State. Not always will the individual win, nor should the State be always the victor, for the Courts in Bangladesh shall have to endeavour to hold the balance fairly between these two conflicting interests. For, they may be supposed to know what has been said by an eminent judge “that each man should be free to develop his own personality to the full: and the only duties which should restrict this freedom are those which are necessary to enable everyone else to do the same. Whenever these interests are nicely balanced, the scale goes down on the side of freedom.”¹⁵

The Enforcement of the Rights

The Fundamental Rights, guaranteed by Part III of the Constitution of Bangladesh, are not “natural” rights but such rights as will be enforceable by Courts; they are a part of the positive law of the land. While the aim to govern and control the absolute power of the State in imposing restrictions on the freedom of the governed, they are, as we have seen, for the most part qualified, not absolute rights, but how far the constitutional protection of such rights will constitute an effective shield against any future executive arbitrariness and legislative invasion is a

¹⁴ Article 42.

¹⁵ Lord Denning, *Freedom Under the Law*.

major problem whose solution would depend as much on the exercise of judicial restraint as on the legislative wisdom of the elected representatives in Parliament. These rights are, no doubt, paramount to ordinary laws.

The insertion of these rights in the Constitution and the guarantee of their enforcement imply judicial review and control of the legislative and executive acts and organs of the State. Insofar as there has been encroachment upon the rights not justified by the constitutional restrictions recognised by the Constitution, the Court will declare the order or statute as invalid, unenforceable and unconstitutional. Under Article 26 of the Constitution the Courts have been empowered to declare laws inconsistent with or made in derogation of the fundamental rights to be void. Any person or citizen who feels aggrieved as a result of an infringement of any fundamental rights may move the High Court Division of the Supreme Court under Article 102 (I) of the Constitution. These Articles provide the means of enforcing the fundamental rights guaranteed by Part III, and have made the Judiciary the guardian of the citizens, liberty and privileges under the Constitution. "The basic principle underlying a declaration of Fundamental Rights in a Constitution is that it must be capable of being enforced not only against the Executive but also against the legislature by judicial process."¹⁶

It has not yet been decided by any Court in Bangladesh how far any of the Fundamental Principles of State Policy will influence the Courts in giving effect to the fundamental rights. But in two cases, the Indian Supreme Court has felt it necessary to examine the Directive Principles set out in the Indian Constitution while considering the validity of legislation alleged to have infringed the fundamental rights.¹⁷ The directive principles cannot override the categorical restrictions imposed on the legislative power of the State under Article 26.¹⁸

¹⁶ *Saiyyid Abul Ala Maudoodi v. The Government*, PLD 1964 SC 673 at p. 783; *Government v. Rowshan Bijaya*, PLD 1966 SC 286 at p. 327.

¹⁷ *Bombay v. Balsara*, AIR 1951 SC 318 ; *Bihar v. Kameswar*, AIR 1952 SC 252.

¹⁸ *M. H. Qureshi v. State of Bihar*, AIR 1958 SC 731.

It would seem that what an eminent writer said in respect of the relationship between the Directive Principles and Fundamental Rights contained in the Pakistan Constitution would also equally apply to that between the Fundamental Principles of State Policy and Fundamental Rights contained in the Constitution of Bangladesh.

“The Principles of policy are ‘a Code of Public Conduct’, which will become widely known among the literate. Legislative proposals repugnant to them will lay themselves open to attack in the legislatures, and during election campaigns. There is no reason to suppose that they will not affect the decisions of the Courts as has happened in India. One rule of interpretation of the Constitution is that a provision which is clear and unambiguous must be liberally interpreted, but, if a provision is not free from ambiguity, regard must be had to the scheme of the Constitution : the directive principles are part of the scheme.”¹⁹

¹⁹ Alan Gledhill, *Pakistan*

CHAPTER TWO

AVOIDANCE OF LAWS INFRINGING THE FUNDAMENTAL RIGHTS

Constitutional Provisions Governing Repugnancy to the Fundamental Rights

Article 26 applies to laws that infringe or will contravene the fundamental rights guaranteed by the Constitution. It contains two directions : Clause (1) of the Article lays down that any pre-Constitution law insofar as it is inconsistent with these rights shall be void to the extent of the inconsistency; Clause (2) declares that the 'State' shall not, in the future, make any law repugnant to the fundamental rights, and that any enactment violating this direction shall be void to the extent of repugnancy. The first part of Clause (2) imposes a prohibition to make a law contrary to fundamental rights, the second part of the Clause which is merely consequential mentions the effect of the breach.¹ Subject to the principle of severability, the Courts are empowered under this Article to declare only those provisions of the impugned law invalid which are repugnant to the fundamental rights. But, even without Clauses (1) and (2) of Article 26 of the Constitution, the Court has the power to declare an Act of Parliament invalid if it contravened any fundamental right.² It is also the duty of the Supreme Court to safeguard the fundamental rights.³

If there is inconsistency between an existing law and any fundamental right, the former is not void *ab initio*, but it becomes

¹ *Mahendra Lal v. State of U. P.* AIR 1963 SC 1019.

² *A. K. Gopalan v. Madras*, AIR 1950 SC 27.

³ *Saiyyid Abul Ala Maudoodi v. Govt. of West Pakistan*, PLD 1964 SC 673 ; *Mustafa Ansari v. D. C.*, PLD 1966 Dac 576 ; *Bashesar Nath v. Commissioner of Income Tax*, AIR 1959 SC 1949.

void with the commencement of the Constitution, and only upon a declaration by the Court.⁴ The burden must be placed upon those who contend that a particular law has become void after the Constitution has come into force to prove that it is so. "We do not start with the presumption that, being a pre-Constitutional law, the burden is upon the State to establish its validity."⁵ This is not, however, the case when a law which has been enacted after the commencement of the Constitution is seen to be inconsistent with a fundamental right. Such a law shall, to the extent of inconsistency, be void *ab initio*.⁶

Clause (1) of Article 26 recognises the validity of pre-Constitutional laws, but declares such laws only as are inconsistent with any of the fundamental rights void. They will, however, revive if the inconsistency in question is removed. This is known as the 'doctrine of eclipse'. On the other hand a law made in contravention of the prohibition imposed by Clause (2) of Article 26 is a still-born law either wholly or partially and the doctrine of eclipse cannot be invoked for its revival.⁷ The use of the words "to the extent of" in both clauses of the Article shows the intention to "save parts of a law as were not inconsistent with or in making which the State did not contravene the prohibition against infringement of fundamental rights and that distinction may conceivably introduce considerations of severability; it has in our opinion no reference to the time for which the voidness is to continue."⁸

A citizen who does not possess a fundamental right is not entitled to ask the Court to declare a law which is inconsistent with it void.⁹

⁴ *Madhu Limaye v. S. D. M.*, AIR 1971 SC 2486.

⁵ *Ibid.*

⁶ *Prov. of E. P. v. Md. Mehdi Ali Khan*, PLD 1959 SC 387 ; *Deep Chand v. State of U. P.*, AIR 1959 SC 648; *Mahendra v. State of U. P.*, AIR 1963 SC 1019.

⁷ *Mahendra Lal v. State of U. P.*, AIR 1963 SC 1019.

⁸ *Ibid.*

⁹ *Keshavan v. Bombay*, AIR 1951 SC 128; *D. K. Nabhirajiah v. Mysore*, AIR 1952 SC 339.

By the Constitution (Second Amendment) Act, 1973 which received the assent of the President on September 22, 1973 a new clause, after Clause (2) of Article 26, was added, "Nothing in this Article shall apply to any amendment of this Constitution made under Article 142." As the insertion of Clause (3) in Article 26 required amendment of Article 142, a new clause was added thereunder as follows: "(2) Nothing in Article 26 shall apply to any amendment made under this Article."

The Court's Duty

The Constitution of Bangladesh, as already seen, has defined, in Part III, those rights generally regarded as fundamental in modern countries with representative and responsible governments. Realising that the mere declaration of such rights would prove ineffective against encroachment by the legislature and the executive, the framers of the Constitution provided remedies for any such violation. A person complaining of abridgement of his rights could, under Clause (1) of Article 102, move the High Court Division for an appropriate writ or order, and, if successful, could be granted a declaration that the impugned provision of law is unenforceable, and such consequential relief as the case demands. The combined effect of Articles 44(1) and 102(1) of the Constitution is to make the guarantee of the constitutional rights a reality and not a mere expression of noble sentiments.

— Procedure of this kind indicated above is usually known as judicial review; it originated in the American Supreme Court which assumed authority to review laws and pronounce on their conformity with the Constitution. Speaking of the duty of the Court when a law is challenged as unconstitutional, Chief Justice Marshall of the United States Supreme Court, made the following observation :

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the Court must determine

which of these conflicting rules governs the case. This is of the very essence of the judicial duty.”¹⁰

Though an eminent political scientist has condemned this exercise of the power of judicial review by saying that in so doing the Supreme Court has become ‘in fact, a third chamber in the United States’,¹¹ a criticism, which even valid is no longer appropriate, it is precisely this power which distinguishes the American system from that prevalent in Britain, where the doctrine of Parliamentary supremacy prevents any judicial enquiry into the validity of any statute. ‘Parliament has the right to make or unmake any law whatever, and no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.’¹²

In some comparatively recent cases the U. S. Supreme Court referred to the nature and scope of judicial duty in relation to the interpretation of an Act of Congress. In *Adkins v. Children's Hospital*¹³ Mr. Justice Sutherland while considering the Court's

¹⁰ *Marbury v. Madison*, 1 Cranch 137, 177(1803) Alexander Hamilton declared in *The Federalist* No. 78 that “the interpretation of the laws is the proper and peculiar province of the courts.” His is the first authoritative statement of the principle of judicial review: “A constitution is, in fact, and must be regarded by judges, as a fundamental law. It therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity, ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”

¹¹ Laski, *The American Government*, 111 (1948). One of the earliest and best formulations of the argument against judicial review appears in the pronouncement of justice Gibson of the Pennsylvania Supreme Court in *Eakin v. Raub*, 12 Sergeant and Raule 330 (1825).

¹² Jennings, *The Law and the Constitution*, at p. 139.

¹³ 261 US 525 at 544 (1923). To similar effect is the observation of Mr. Justice Roberts in *U. S. v. Butler*, 297 US 1 (1926): “This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.”

authority to ascertain and determine the law in a given case when there is conflict, observed that its duty is

“to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which transcending the Constitution, is of no effect and binding on no one. This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose a case or controversy properly before the Court, to the determination of which must be brought the test and measure of the law.”

In considering the constitutionality of a statute Courts should not sit in judgment on the wisdom of legislative action, for, as has been observed by Mr. Justice Stone, “Courts are not the only agency of government that must be assumed to have capacity to govern.”¹⁴

The Court’s duty in relation to the interpretation of the limitations imposed by a superior law on the legislative and executive powers has been stated in the past by the Courts in this country. As early as 1878, the Judicial Committee of the Privy Council expressed the view that it is the Court’s function to consider the impugned law and ascertain the degree of inconsistency between it and any other provision which restricts such law:

“The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively they are restricted”.¹⁵

¹⁴ *US v. Butler*, 297 US 1. (1926) In *McCulloch v. Maryland*, 4 Wheat 316 (1819), Chief Justice Marshall stressed the need to respect the legislative determination in no uncertain terms : “But where the law is not prohibited, and it is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department and to trade on legislative ground. This Court disclaims all pretensions to such a power.”

¹⁵ *Queen v. Burah*, (1878) L. R. 5 I. A. 178.

In a case decided after the abrogation of the Constitution of Pakistan, 1956, Munir CJ, in claiming the power of ascertaining the inconsistency between the impugned law and the Constitution, asserted:

“The supremacy of the constitutional law in the American system follows from the constitutional direction that the Constitution shall be the supreme law of the land, but our Constitution contained no such direction but attained the same result by declaring the law to be void to the extent it came into conflict with a fundamental right.”¹⁶

In a different context, the power of determining the constitutionality of an enactment was claimed in a case which arose under the Constitution of Pakistan, 1962, involving the interpretation of the President's power to modify the Constitution for the purpose of removing any difficulties that may arise in bringing the Constitution, or any provision contained therein into operation. In upholding the judgment of Murshed J of the Dacca High Court, who declared the President's Order No. 34 of 1962 unconstitutional, because it necessitated the destruction of the essential feature of a Constitution as originally designed by its framers, S. A. Rahman J of the Supreme Court, observed:

“Cases of conflict between the Supreme law of the Constitution and an enactment might come for adjudication before the Courts and in such cases, it would be the plain duty of the superior courts, as its preserves, protectors and defenders, to declare the enactment in question as invalid, to the extent of its repugnancy with the constitutional provisions.”¹⁷

In interpreting the provisions under the Constitution of Pakistan, 1962, similar to those contained in Articles 26 and 102(1), which provided the means of enforcing the fundamental rights, Hamoodur Rahman J stated in very broad terms the duty of the Courts:

“It is not necessary for the High Courts in this country to declare a law to be void, for, the Constitution itself has done that. But all that the High Courts are called upon to do is to decide whilst enforcing

¹⁶ *Province of East Pakistan v. Mehdi Ali Khan*, PLD 1959 SC 387.

¹⁷ *Fazlul Quader Chowdhury v. Mohammad Abdul Haque*, PLD 1963 SC 486.

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a fundamental right as to whether that right has been restricted by any law and whether such a restriction is a reasonable restriction imposed in accordance with the terms of the Constitution. If it finds that there is a law which is inconsistent with the fundamental rights conferred by the Constitution.....the High Courts have no other option but to treat that law as void to the extent of the inconsistency and enforce the fundamental right.”¹⁸

Thus, where the limitations, express or implied, upon the legislative power of the state exist, provisions relating to fundamental rights being such limitations, it becomes the duty of the Court to declare an act invalid because the legislature suffers from want of constitutional power to enact, or because the constitutional conditions have not been observed. But, when the Court is faced with the duty of exercising the power to declare a legislative enactment invalid, it cannot assume powers not conferred upon it by the Constitution. The circumstances under which a legislative enactment may be declared unconstitutional and which are clearly expressed in the following words by an American writer are worth considering:

“The Courts may declare legislative enactments unconstitutional and void in some cases, but not because the Judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the Constitution as the paramount law, whenever, a legislative enactment comes in conflict with it. But the Courts sit, not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the legislature has failed to keep within its constitutional limits, that they are at liberty to disregard its action; and in doing so they only do what every private citizen may do in respect to the mandates of the Courts when the Judges assume to act, and to render Judgment or decrees without Jurisdiction. Nevertheless, in declaring a law unconstitutional, a Court must necessarily cover the same ground which has already been covered by the legislative department in deciding upon the propriety of enacting the law, and

¹⁸ *Saiyyid Abul Ala Maudoodi v. The Govt. of West Pakistan*, PLD 1964 SC 673 at p. 783. Followed in *Mustafa Ansari v. Deputy Commissioner*, PLD 1966 Dac 576.

they must indirectly overrule the decision of that co-ordinate department. The task is, therefore, a delicate one, and only to be entered upon with reluctance and hesitation.”¹⁹

Courts in this sub-continent have, in reviewing an Act of the Legislature, developed rules of construction.²⁰ In interpreting

¹⁹ Cooley, *Constitutional Limitations*, 8th edition, Vol. 1, at pp. 333-334. From a study of a few cases decided under the American Constitution, the various circumstances which the Courts, before declaring a legislative Act to be unconstitutional, would consider were summarised by the same writer.

Something more than private rights are involved; the fundamental law of the State is in question, as well as the correctness of legislative action; and considerations of courtesy, as well as the importance of the question involved, should lead the Court to decline to act at all, where they cannot sustain the legislative action, until its deliberate opinion is found to be against it. (*Briscoe v. Commonwealth Bank*, 8 Pet. 118).

Neither will a Court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. (*Hoover v. Wood*, 9 Ind. 286)

Nor will a Court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defending it. (*Wellington, Petitioner*, 16 Pick. 87)

Nor can a Court declare a Statute unconstitutional and void, solely on the ground of unjust and oppressive provisions or because it is supposed to violate the national, social or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution. (*State v. Harrington*, 68 Vt. 622)

If the Courts are not at liberty to declare statutes void because of their apparent injustice or impolity, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the Constitution. (*State v. Nankato*, 117 Minn. 458)

Nor are the Courts at liberty to declare an act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words. When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. (*People v. Fisher*, 24 Wend. 215)

²⁰ *R. M. D. Chamarbaugwalla v. Union of India*, AIR 1957 SC 628.

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an Act of Congress, the U. S. Supreme Court adheres to what are known as "cautionary considerations" or "rules of self-restraint."²¹

The Presumption of Validity

Whenever a legislation is challenged as unconstitutional the presumption is in favour of its constitutionality.²² In order to decide whether a particular legislation is unconstitutional as offending against the provisions of the Constitution, it is necessary to examine with some strictness the substance of the legislation so that what really has been enacted by the legislature may be determined. The Court is not over persuaded by the mere appearance of the legislation. "The Court has to look behind the names, forms and appearances to discover the true character and nature of the legislation."²³

When an enactment is challenged on the ground of violation of any of the fundamental rights, to decide upon its constitutionality it becomes necessary to examine its subject matter, the area in which it is intended to operate, its intent and purport. To do so the Court has "to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it is intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy."²⁴

A greater amount of caution is necessary before striking down a law. Thus, in upholding the validity of section 57 of the

²¹ These "cautionary considerations" have been discussed by Justice Brandeis in *Ashwander v. T. V. A.*, 297 US 288 (1936).

²² *Chiranjit Lal v. Union of India*, AIR 1950 SC 41; *State of Bombay v. Balsara*, AIR 1951 SC 318. It may be mentioned that "there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution," such as those of Part III of the Constitution of Bangladesh. *US v. Carolene Products Co.*, 304 US 144 (1938).

²³ *Dwarkanadas v. Sholapur Spinning & Weaving Company Limited*, AIR 1954 SC 119; *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554.

²⁴ *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554; *Bengal Immunity Co. Ltd. v. State of Bihar*, AIR 1955 SC 661.

Electoral College Act, 1964, Hamoodur Rahman J of the Supreme Court of Pakistan, observed:

“One of the cardinal principles of interpretation is that a law should be interpreted in such a manner that it should rather be saved than destroyed. The Court should lean in favour of upholding the constitutionality of a legislation.....This power should be exercised only when absolutely necessary, for injudicious exercise of this power might well result in grave and serious consequences.”²⁵

Though in determining whether a particular legislation conforms with the Constitution the Court does not proceed “to tilt at legislative authority in a crusader’s spirit” but in discharge of a constitutional duty, it would lean in favour of constitutionality if there was a question of exceeding legislative power.

“While the Court naturally attaches great weight to the legislative Judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute.”²⁶

Thus, the Court has a duty to act as a sentinel on the *qui vive* against encroachment on the fundamental rights.

The onus is on the litigant to prove that the impugned statute is not valid. But a litigant cannot attack the validity of a statute unless he can demonstrate its invalidity in the application to him. A person affected by an unconstitutional statute has, in the words of Lord Porter, “the right to ignore, and if necessary to call on the judicial power to help him to resist, legislative or executive action which offends against the section.”²⁷ In this case the question was whether the provisions of the Australian Banking Act, 1947 infringed Section 92 of the Australian Constitution which lays down— “On the imposition of customs duties, trade, commerce and intercourse among the States shall be absolutely free.”

There is undoubtedly a presumption in favour of the validity of a legislation, but if, on the face of it, the legislation is seen to violate a fundamental right it will be declared unconstitutional,

²⁵ *Province of East Pakistan v. Serajul Haq*, PLD 1966 SC 854 at p. 954.

²⁶ *Madras v. V. G. Row*, AIR 1952 SC 196.

²⁷ *Commonwealth of Australia v. Bank of New South Wales*, (1950) AC 235.

unless the person who supports the legislation can bring it within the purview of any exception provided under the Constitution.²⁸

A legislature is presumed to understand and appreciate the needs of the people and that "its laws are directed to problems made manifest by experience and that its determinations are based upon adequate grounds."²⁹

If there can be two possible interpretations of a statute "by one of which it would be unconstitutional and by the other valid, the court should adopt that which will hold the Act."³⁰ But this should not be understood as meaning that "constitutional provisions may be stretched by interpretation with the object of saving the validity of statutes, which *ex facie* contravene the Constitution."³¹ On the other hand, it is not permissible to put a narrow construction upon a constitutional provision and thereby to prejudice the validity of a statute. Thus, in considering a case which involved the validity of Section 3 of the Punjab Public Safety Act, Cornelius J observed:

"In all circumstances, the full scope and extent of the constitutional provision must first be determined, and if the statute in question is capable of a construction which is conformable to the true meaning

²⁸ *Saghir Ahmad v. State of U. P.*, AIR 1954 SC 728.

²⁹ *Middleton v. Texas, Power Co.*, (1919) 249 U.S. 152; *Chiranjit Lal v. Union of India*, AIR 1951 SC 41; *Mohant Moti Das v. S. P. Shahi*, AIR 1959 SC 942; *State of Bombay v. Balsara*, AIR 1951 SC 318; *Swami Motor Transport v. S. Mutt*, AIR 1963 SC 864.

In *Qureshi v. State of Bihar*, AIR 1958 SC 731, the Indian Supreme Court, while admitting that the proper approach of the Court should be to acknowledge that "the legislature is the best judge of what is good for the community, by whose suffrage it comes into existence," quite emphatically asserted that "the ultimate responsibility for determining whether a restriction upon a fundamental right is in the interests of the public must rest with the Court." For the purpose of determining the constitutionality of an Act, "the Court may take into consideration matters of common knowledge, history of the times and may assume every state of facts that may have existed at the time of legislation, *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554; *Ram Krishna Dalmia v. Shri Justice S. R. Tendol Kar*, AIR 1958 SC 538."

³⁰ *U. S. v. Delaware*, (1909) 213 US 366.

³¹ *Abdul Aziz v. Province of West Pakistan*, PLD 1958 SC 499.

of the relevant constitutional provisions, then that construction should be accepted.”

He went on to say that the courts are not allowed “to adopt the Constitution for the purpose of saving a statute when in fact the requirement is that all statutes and, more generally, all sub-constitutional laws should conform to the Constitution.”³²

If the material provisions of an impugned legislation contravene one or the other of the fundamental rights, the Court’s duty is to avoid a construction which would make the legislation *ultra vires*. “If the impugned provisions of the statute are reasonably capable of a construction which does not involve the infringement of any fundamental rights, that construction must be preferred though it may reasonably be possible to adopt another construction which leads to the infringement of the said fundamental rights.”³³

Effect of Declaration of Invalidity

What happens to the statute when declared void by the Courts? The judges of the American Courts and of other countries have exercised their judicial minds on this question. The Court’s declaration that the impugned law is unconstitutional “neither annuls nor repeals the statute but has the effect of ignoring or disregarding it so far as the determination of the rights of private parties is concerned.”³⁴ In spite of the declaration against its validity, the impugned statute remains in its original form and glory on the Statute Book. Only those who know will realise that some metamorphosis has taken place, that it is no longer good law. The effect of inconsistency with, or contravention of, the constitutional rights will be that the impugned statute will become ‘void’, the word used in Article 26. But will the statute be void as a marriage is void on a declaration of nullity or a contract is void within the meaning of Section 2(g) of the Contract Act? Will it become non-existent in the eyes of the judges? Will it be deemed to be no law at all?

³² *Ibid.*

³³ *Tilkayat v. State of Rajsthan*, AIR 1963 SC 1628.

³⁴ Willis, *Constitutional Law* (1936) p. 89.

It will be of some interest to note a few observations by the American Courts on this problem. The early view was that a statute which infringes a constitutional provision was no law at all. In *Norton v. Shelby County* Field J observed:

"An unconstitutional Act is not a law, it confers no rights, it imposes no duties, it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed."³⁵

This position was, as will be seen from the passage quoted below, abandoned in favour of a more reasonable approach to the solution of the problem. Referring to such broad statement as to the effect of a determination of unconstitutionality that the Act of Congress was not a law and that it was inoperative conferring no rights and imposing no duties and disagreeing with it, Chief Justice Hughes of the United States Supreme Court, said:

"The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new Judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects—with respect to particular conduct, private and official. Questions of rights claimed to have become vested, of status of prior determination deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of Courts, State and Federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retrospective invalidity cannot be justified."³⁶

It seems that it is inappropriate to say, when an Act of the legislature violates a constitutional right, that it is void and is to be deemed as an absolute nullity. This is clearly illustrated from the following observations made by Shaw CJ in *In re Wellington*:

"It may well be doubted whether a formal act of legislation can ever, with strict legal propriety, be said to be void; it seems more consistent with the nature of the subject, and the principles applicable to

³⁵ (1886) 118 U. S. 425.

³⁶ *Chicot Country Drainage District v. Baxter State Bank*, (1940) 308 U. S. 371.

analogous cases, to treat it as voidable. But whether or not a case can be imagined in which an act of the legislature can be deemed absolutely void on the ground that it exceeds the just limits of legislative power, and thus injuriously affects the rights of others, it is deemed to be void only in respect of those particulars, and as against those persons whose rights are thus affected.³⁷

He, further, observed that an Act can be declared void by a Court only when a person whose right is affected challenged its validity:

“*Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid, and it is only when some person attempts to resist its operation, and calls in the aid of judicial power to pronounce it void as to him, his property or his rights, that the objections of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well established principles of law in the conclusion that such an act is not void, but voidable only; and it follows as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those who only have a right to question the validity of the act, and not by strangers. To this extent only it is necessary to go in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power and to this extent only, therefore, are Courts of justice called on to interpose.”³⁸

From the above observations it would seem that an Act passed by the legislature cannot, strictly speaking, become void but it can only be avoided by those who think themselves aggrieved by such legislation and the Court's duty is to nullify the effect of the Act insofar as it affects their person, property or rights.³⁹

When a statute is adjudged to be unconstitutional, it can no longer be a source of any rights:

³⁷ 16 Pick (Mass) 96. The principles stated in this case were approved by the Supreme Court of Pakistan in the case of *Province of East Pakistan v. Mehdi Ali Khan*, PLD 1959 SC 389.

³⁸ *Ibid.*

³⁹ As the Court's function is to determine the rights of parties, it will not declare an Act upon which they are relying unconstitutional unless the determination of their rights require it, *Province of East Pakistan v. Mehdi Ali Khan*, PLD 1959 SC 387. A Court will not declare a statute unconstitutional at the instance of a stranger, *Muhammad Ishaq v. The State*, AIR 1961 All 522.

“Rights cannot be built up under it, contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which consequently, is to be regarded as having never, at any time, been possessed of any legal force.⁴⁰”

A statute may, as already seen, be invalid for either of two reasons, that is, for want of power to legislate on its subject matter or it may be invalid for infringement of some constitutional check imposed upon the legislature when exercising its powers. In the former case the Indian Courts take the view that the statute cannot become valid even if there is a subsequent conferment of affirmative power to legislate on that particular subject but in the latter case when the constitutional ban is lifted the statute would be valid.⁴¹

Under the Indian Constitution, a state legislature could not impose taxes on sales taking place in the course of inter-State trade without the consent of Parliament, and some time elapsed before Parliament accorded the necessary consent. In a Madras case⁴² the question was whether an Act was obliterated from the Statute book on a certain date or whether it was factually in existence but was temporarily unenforceable for want of timely Parliamentary legislation. There are two possible theories. One possible view is, as the Court observed, that

“an unconstitutional law has a factual existence but is frozen and incapable of enforcement by reason of its contravening the constitution. When, however, the constitutional ban ceases to operate and the fetters whose existence rendered that law moribund are removed, the law which therefore, was so to speak; in a state of hibernation, springs into activity, because the superimposed shackles are removed.”

As regards the other possible view, the Court was of the opinion that:

⁴⁰ Cooley, *Constitutional Limitations*, 8th Edition, p. 382.

⁴¹ *Sm. Chhaya Devi v. Bihar*, AIR 1957 Pat 44.

⁴² *Mysore Spinning and Manufacturing Co. Ltd., v. Deputy Commercial Taxing Officer*, AIR 1957 Mad 368.

“a law which is repugnant to any provision of the Constitution is no law at all though found in print.....the effect of such a declaration or holding is, as it were, to obliterate the law and efface it from the statute book.”

The first of the alternative views seems to be the correct approach to the problem. And though the two cases⁴³ previously decided by the Indian Supreme Court appeared to favour the second view, S.R. Das J in another case⁴⁴ had accepted the respondent's contention that the inconsistency between the provisions of the impugned Act and Article 19(1) (g) of the Indian Constitution was removed by the First and Fifth Amendments to the Constitution and so the impugned Act became operative and revitalised. He observed:

“The Act was not dead but it was merely over-shadowed by the fundamental right and remained dormant. As regards non-citizens the Act was fully operative, but as against citizens the Act was not dead but remained in a dormant or moribund condition. The true position was that the impugned statute was *eclipsed* by the *fundamental* right and the effect of the Constitution (First Amendment) Act, 1951 was to remove the shadow and to make the impugned act free from all blemish or informity. The word “void” in Act 13(1) should be interpreted to mean “void to the extent of the inconsistency with the fundamental right” and the language of the Article made it quite clear that the entire operation of the inconsistent Act was not wiped out; the Act applied to past transactions, the right and liabilities accruing therefrom, even after the commencement of the Constitution, to apply to all non-citizens.”

In deciding an appeal from a case remitted by itself to the Dacca High Court for determining the question ‘as to what extent the dedications involved in the wakfs come within the definition of religious institution and are accordingly protected by Article 18 of the Constitution of Pakistan, 1956 and for granting such relief as the Court in its discretion may consider to be appropriate in the circumstances’, the Supreme Court of Pakistan considered the circumstances when a law became void.

Munir CJ who delivered the judgment of the Court, drew a distinction between a law which was void due to its repugnancy

⁴³ *Saghir Ahmad v. State of U. P.*, AIR, 1954, SC 728; *Behram K. Pesikaka v. State of Bombay*, AIR 1955 SC 123.

⁴⁴ *Bhikaji Narain Dhakras v. State of M. P.*, AIR 1955 SC 781.

to some other law or the Constitution. He felt, quite correctly, that fundamental differences existed between a law that is made by an incompetent legislature and a law made by a competent legislature but which is in conflict with a fundamental right. Applying this principle, he found that the former was void on general principles, the latter became void only to the extent of the repugnancy, in the sense that it would not be applied to a particular case. A law enacted by a legislature which suffers from an inherent lack of power was, according to him, void *ab initio* and must be deemed never to have been enacted.

“If it exists on the Statute Book, it has no legal sanction and is essentially of the nature of an unauthorised writing on the Statute Book. Even if the defect or lack of jurisdiction is removed by a subsequent conferment of the requisite legislative power, the law enacted when no such power existed will continue to be void and will create no rights or obligations unless it be re-enacted.”⁴⁵

Here, the Supreme Court also considered the question why a declaration is made as to the invalidity of a law when a conflict is seen to exist between the impugned law and the Constitution. The method which is used for obtaining a declaration as to such invalidity is the judicial method. One who challenges the constitutionality of a law must raise a case in which he has a real and personal interest. If the Court finds a conflict between the law and the Constitution it declares the law void because it is necessary for the determination of the right or liability in issue.

In a case involving the interpretation of the scope of the fundamental right to form associations the Supreme Court of Pakistan had to consider the question whether the Criminal Amendment Act, 1908 and the action taken thereunder against the Jamat-i-Islam, a political party operating in both wings of Pakistan, were void due to their inconsistency with such right. In determining the meaning of the word ‘void’ as used in Article 6(1) of the Constitution of Pakistan, 1962, which corresponds to

⁴⁵ *Province of East Pakistan v. Md. Mehdi Ali Khan*, PLD 1959 SC 387; *Tamizuddin Ahmed v. Govt. of East Pakistan*, PLD 1964 Dac 795. In *Dwarkadas v. Sholapur Spinning and Weaving Co.*, AIR 1954 SC 119, the Indian Supreme Court held that “only a person who is directly affected by a law can challenge the validity of that law.”

Article 26(1) of the Constitution of Bangladesh, S. A. Rahman J referred to *Mehdi Ali Khan's* case and approved what was stated therein as regards the meaning of 'void'. He observed :

"It was made clear in that decision that when it is said that a particular existing law has become 'void' owing to its conflict with a fundamental right, it does not mean that it was void *ab initio* or that it was effaced from the statute book. It only means that such a law becomes unenforceable so long as a conflict with a fundamental right exists and if the fundamental right for some reasons or the other disappears, the law would become operative again. It is really a state of hibernation rather than one of death."⁴⁶

While accepting the argument that a law, as it was inconsistent with a fundamental right, was merely of no legal effect to that extent it was not repealed, Hamoodur Rahman J observed :

"Clause (1) of Article 6 of the Constitution does not, in my view, have the effect of repealing even *pro tanto* existing laws which are inconsistent with the fundamental rights conferred by the constitution.

"The law continues to exist, for, it may by appropriate amendment, be brought into conformity with the provisions of the Constitution, or as happened in India, by the subsequent incorporation of Article 31 in the Constitution of India, the constitutional guarantee may itself be so whittled down that the existing law may then be found to be in conformity with the whittled down provisions of the Constitution."

In stating a different reason for holding this view he mainly considered that in the absence of any provision to show that the Constitution will have retrospective effect, the conflict with existing laws can arise only from the date of the commencement of the Constitution. He expressed the opinion that the law would still be operative in respect of rights, obligations and liabilities which had already accrued and the validity of acts done and completed under such law before the Constitution came into force would remain unaffected:

"The use of the word 'void', therefore, does not produce the result of obliterating the inconsistent provisions of the existing law altogether from the statute book, but all that happens is that in enforcing a

⁴⁶ *Saiyyid Abul A'la Maudoodi v. The Government of West Pakistan*, PLD 1964 SC 673. Orders which took effect before, the commencement of the Constitution cannot be challenged as being contrary to the Constitution, *Pannalal v. Union of India*, AIR 1957 SC 397.

fundamental right the High Courts will not give effect to any of the provisions of existing law in so far as they are inconsistent with the fundamental rights guaranteed by the Constitution."

Severability

Since in countries governed under written Constitutions the constitutionality of statutes are often challenged before the Courts, one of the most well-known principles of interpretation evolved by the latter relates to the severability of the impugned statute.

The doctrine of severability involves the consideration of the question whether an Act of Parliament which is void in part is to be considered wholly void or whether it is enforceable so far as the valid portion is concerned. This question assumes relevance when the enactment proceeds from a legislature which is subject to limitations imposed by a written Constitution. When the legislature which enjoys limited powers of legislation enacts a law beyond its limits, it is entirely void and inoperative. But where the legislation falls partly within its limits and partly outside such limits, does it become wholly void? The answer to this question "must depend on whether what is valid could be separated from what is invalid, and that is a question which has to be decided by the Court on a consideration of the provisions of the Act."⁴⁷

The doctrine of severability, so far as the enforcement of fundamental rights is concerned, owes its origins to the wording of Article 26. This Article, as already seen, provides that laws inconsistent with fundamental rights are void to the extent of inconsistency with the latter. Impliedly, the "consistent and inconsistent parts of a law are severable."⁴⁸ In deciding upon the constitutionality of sections 4 and 5 of the Prize Competitions Act, 1955 which were challenged on the ground that 'prize competition,' as defined in the Act, included not only competition that was of a gambling nature but those in which success depended to a substantial degree on skill, it was held that the impugned

⁴⁷ *R. M. D. Chamarbaugwalla v. Union of India*, AIR 1957 SC 628.

⁴⁸ *The Superintendent v. Dr. Ram Monohar Lohia*, AIR 1960 SC 633.

provisions were severable and the competitions which were sought to be regulated by the Act were only those competitions in which success did not depend to a substantial degree on skill.⁴⁹

When a statute is challenged as having infringed any Constitutional provisions it may be declared wholly unenforceable or a part or a section of it or some words in a section may be declared invalid. In the latter case, that is, when a part of a section or some words in a section offends against a Constitutional limitation, and that part or section or words are severable from the remaining portions of the statute, the Court applies the doctrine of severability and declares the offending provisions of the statute invalid.

“When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the Legislature or by reason of its provisions contravening constitutional prohibitions.”⁵⁰

But, when a law seeks to impose restrictions some of which may fall outside the constitutionally permissible limits of legislative action and cannot be separated from those which are within such limits, such an enactment is wholly void. In the words of Sastri J:

“Where a law purports to authorise imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.”⁵¹

⁴⁹ *R. M. D. Chamarbaugwalla v. Union of India*, AIR 1957 SC 628.

⁵⁰ *Ibid.*

Habeeb Mohammad v. State of Hyderabad, AIR 1953 SC 287 *Express Newspapers (Private) Ltd. v. The Union of India*, 1959 AIR 1960; *Hamdard Dawakhana v. The Union of India*, AIR 1960 SC 554. In cases where a part of a section or words are declared invalid the Court will ordinarily issue a writ in the nature of *mandamus* directing the respondent Government not to enforce such invalid portions of the statute, *Mohd. Hanif Qureshi v. State of Bihar*, AIR 1958 SC 731.

⁵¹ *Romesh Thapper v. State of Madras*, AIR 1950 SC 124; *Chintaman Rao v. State of Madhya Pradesh*, AIR 1951 SC 118.

When some part of a statute has been successfully impugned, there may be three possibilities. "First, some words may be wholly inoperative (i.e. *ultra vires* in all their conceivable applications) and the result of holding them void is that they are to be ignored without prejudice to the validity of the rest of the Act ("vertical severance"). Secondly, some words may be susceptible of *intra vires* and *ultra vires* applications, and the result of so holding is (a) the same as in the first case, or (b) that they are to be ignored as to their *ultra vires* applications without prejudice to their validity in applying to other situations ("horizontal severance"). Finally, a holding that any words are susceptible of any *ultra vires* application may mean that the whole statute is to be ignored."⁵²

Though in the United Kingdom, the Courts have not to face questions of constitutionality of statutes, the Judicial Committee of the Privy Council, in hearing appeals from the highest tribunal of the Colonies and Dominions has occasionally to pronounce Acts passed by the legislatures of these countries inoperative in whole or in part. In this connection they have to consider the doctrine of severability of statutes which applies when parts of statute have to be declared unconstitutional, and the question arises whether the rest of it can be upheld.

In *In re the Initiative and Referendum Act*⁵³ the Judicial Committee held that an Act which contained provisions allowing voters the power of initiative and repeal by referendum was wholly void, because once the offending provisions were excised, the rest became unintelligible. In delivering the opinion of the Committee, Viscount Haldane observed:

"The offending provisions are in their Lordships' view so interwoven into the scheme that they are not severable.

⁵² In 17 Modern Law Review 249. Mr. Sheridan discussed these possibilities with reference to the case of *Ulster Transport Authority v. James Browne and Sons Ltd.*, 1953 N. Y. L. R. 79.

⁵³ (1919) AC 935.

Another proposition to which Lord Atkin refers in *A. G. for British Columbia v. A. G. for Canada*⁵⁴ is that if the main provisions of an Act are excised, the ancillary provisions must go, even if they could stand intelligibly by themselves. Here, a Dominion Act was held invalid because it purported to regulate trade wholly within a province. It was ruled that "as the main legislation is invalid as being in pith and substance an encroachment upon the provincial rights the sections referred to must fall with it as being in part merely ancillary to it."

Where the legislature carelessly used words wide enough to have an *ultra vires* application the Court held severability to be impossible. A provincial legislature enacted an "Act to provide for the collection of a tax which operated in some cases as a direct tax and in other cases as an indirect tax." The provincial legislatures in Canada are not empowered to impose an indirect tax. Holding the Act void at the suit of a direct tax-payer, Viscount Haldane observed:

"If, therefore, the statute seeks to impose on the brokers and agents and the miscellaneous group of factors and elevator companies who may fall within its provisions, a tax which is in reality indirect within the definition which has been established, the task of separating out these cases of such persons and corporations from others in which there is a legitimate imposition of direct taxation is a matter of such complication that it is impracticable for a court of law to make the exhaustive partition required. In other words, if the statute is *ultra vires* as regards the first class of cases, it has to be pronounced to be *ultra vires* altogether. Their Lordships agree that if the Act is inoperative as regards brokers, agents and others, it is not possible for any court to presume that the legislature intended to pass it in what may prove to be highly truncated form."⁵⁵

⁵⁴ (1937) AC 377 at 389. While expressing its accord with the views expressed by the Supreme Court of Ceylon that there is a conflict between Section 55 of the Constitution and Section 41 of the Bribery Amendment Act, 1958 under which the Bribery Tribunal which had tried and convicted the respondent for corruption was constituted and, therefore, the orders made against him were null and inoperative, Lord Pearce, who delivered the judgment of the Court, said that "where invalid parts of the statute which are *ultra vires* can be severed from the rest which is *intra vires* it is they alone which should be held invalid," *Bribery Commissioner v. Ranasinghe*, (1965) AC 172.

⁵⁵ *A. G. for Manitoba v. A. G. for Canada*, (1925) AC 561 at p. 567.

Where the intention of the legislature is to cover both *intra vires* and *ultra vires* applications the main purpose of the Act would be defeated. In an Australian case it was held by the High Court of Australia:

“When a legislature assumes jurisdiction over a whole class of ships over some of which it has and over others of which it has not jurisdiction, and plainly assets its intention to put them on the same footing, the Court would be in effect making a new law if it gave effect to the statute as a law intended to apply to part only of the class. Whether the legislature would or would not have imposed disabilities upon some only of the class if they had applied their mind to the subject is entirely problematical. It is sufficient to say that the law as sought to be enforced is substantially a different law from that actually enacted.”⁵⁶

The whole enactment was declared invalid because it was impossible to ascertain an intention that some only of the class designated by the collective expression should be affected if others were not.

In considering the question whether when Part II of the Alberta Bill of Rights Act, 1946 has been struck out from the Act as invalid, what is left should be regarded as surviving, or whether, on the contrary, the operation of cutting out Part II involves the consequence that the whole Act is a dead letter, Viscount Simon observed:

“This sort of question arises not infrequently and is often raised by asking whether the legislation is *intra vires* ‘either in whole or in

⁵⁶ *S. S. Kalibia v. Wilson*, (1910) 11 C. L. R. 689. In considering whether when Part II of the Alberta Bill of Rights Act, 1946 has been struck out from the Act as invalid, what is left should be regarded as surviving, or whether, on the contrary, the operation of cutting out Part II involves the consequence that the whole Act is a dead letter, Viscount Simon observed: “This sort of question arises not infrequently and is often raised by asking whether the legislation is *intra vires* ‘either in whole or in part’, but this does not mean that when Part II is declared invalid what remains of the Act is to be examined bit by bit in order to determine whether the Legislature would be acting within its powers if it passed what remains. The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it sometimes been put, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is *ultra vires* at all.” *A. G. for Alberta v. A. G. for Canada*, AIR 1948 PC 194 at p. 199.

part", but this does not mean that when Part II is declared invalid what remains of the Act is to be examined bit by bit in order to determine whether the Legislature would be acting within its powers if it passed what remains. The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is *ultra vires* at all."⁵⁷

Cooley in *Constitutional Limitations* discussed the principles enunciated in some of the American cases which considered the doctrine of severability.⁵⁸

⁵⁷ *A. G. for Alberta v. A. G. for Canada*, AIR 1948 P. C. 194 at p. 199.

⁵⁸ 8th Edition, at pp. 359-361.

"A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish some lawful, and even laudable object, by means repugnant to the Constitution of the United States or of the State. (*Commonwealth v. Clapp*, 5 Gray 97)

A statute may contain some such provisions, and yet the same Act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. (*Ibid.*) Where, therefore, a part of a statute is unconstitutional that fact does not authorise the courts to declare the remainder void also unless all the provisions are connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. (*Commonwealth v. Hitchings*, 5 Gray 482.)

The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. (*Ibid.*) If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in

Retrospective Operation

Is the first clause of Article 26 retrospective ? In the absence of an intention to the contrary, all laws are prospective in their operation.⁵⁹ "The Constitution cannot be considered to be an exception to this general rule."⁶⁰ The language used in Clause (1) of Article 26 does not indicate that the intention was to apply this clause retrospectively. Whether laws are procedural or they relate to substantive rights, the inference is that if they come into conflict with fundamental rights they are to be deemed as void from the coming into force of the Constitution.

The Indian Supreme Court has denied any retrospective operation to the similar clause in Article 13 of the Indian Constitution.⁶¹ In *Ahuja v. State of Bombay*⁶² the Bombay Public Safety Measures Act, 1947, was impugned as being discriminatory and violative of Article 14 of the Indian Constitution. The respondent, on the authority of the decision in *K. M. Menon's* case, contended that the Fundamental Rights had no retrospective operation and the proceedings started before the Constitution

determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule, this is a question of legislative intent. (*Dorchy v. Kansas*, 264 US 286.)

If a statute attempt to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only and some of its provisions are void, the whole must fall unless sufficient remains to effect the object without the aid of the invalid portion. (*Santo v. State*, 2 Iowa 165) And if they are so mutually connected with and dependent on each other, as to warrant the belief that the legislature intend them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." (*Warren v. Mayor*, 2 Gray 84.)

⁵⁹ *The Delhi Cloth and General Mills Company Ltd. v. Income Tax Commr.*, AIR 1927 PC 242; *Colonial Sugar Refining Co. Irving*, (1905) AC 369.

⁶⁰ *Muhammad Bashir v. Govt. of West Pakistan*, PLD 1958 Lah 853.

⁶¹ *Keshava M. Menon v. State of Bombay*, AIR 1951 SC 128; *State of Bombay v. Balsara*, AIR 1951 SC 318; *Bhikaji N. Dhakras v. State of M. P.*, AIR 1955 SC 781; *Mahendra v. State of U. P.*, AIR 1963 SC 1019.

⁶² AIR 1952 SC 235.

could not, therefore, be void under Article 13. The Supreme Court of India distinguished *Menon's* case, in which substantive rights were involved, and held the petitioner entitled to protection against the operation of a discriminatory procedural law.

If any action was taken before the commencement of the Constitution under the provisions of a valid law such action cannot be challenged as unconstitutional and void on the ground that it violates any of the fundamental rights.⁶³

Rights and liabilities which have accrued under a pre-constitutional law may be enforced after the coming into force of the Constitution, even though it may be found discriminatory.⁶⁴

In *Syed Qasim Rizvi v. State of Hyderabad*,⁶⁵ the question was whether, after excising the discriminatory provisions of the Hyderabad Special Tribunal Regulation, a fair trial could be secured to the petitioner. A substantial part of the trial took place before the Constitution and a part of it followed after the Constitution. The Supreme Court held that in trial after the Constitution the procedure that was applied was valid as it secured fair treatment to the petitioner. Bose J dissented and pointed out that:

“the Court should not have deviated from the principle set by it in *Ahuja's* case. A lack of consistent approach in these cases is not difficult to discern.”

In *Jibendra Kishore v. East Pakistan*,⁶⁶ the East Bengal State Acquisition and Tenancy Act, 1950 was impugned before the Dacca High Court as discriminatory and violating the equal protection clause of Article 5(1) of the Pakistan Constitution of 1956 which came into force on March 23, 1956. In holding that the Constitution had no retrospective effect, Amin Ahmad CJ held that:

“consequently, a citizen had no fundamental rights in the sense in which they are now understood. If these fundamental rights came

⁶³ *Pannalal v. Union of India*, AIR 1957 SC 397.

⁶⁴ *Habeeb Mohammad v. Hyderabad*, AIR 1953 SC 287.

⁶⁵ AIR 1953 SC 156.

⁶⁶ PLD 1957 Dac 1. In *Dilbar Husain v. Khurshid Ahmad*, PLD 1956 Lah 865, Rahman CJ observed that fundamental rights incorporated in the

into existence as such, on the coming into force of the Constitution, nothing done before March 23, 1956, could be said to have infringed any fundamental rights."

But, he said, that the rights and liabilities which accrued before the Constitution under a pre-constitutional law could not be enforced after the Constitution, because they would offend against the Constitutional provisions against discrimination. In his considered opinion the discriminatory provisions in any pre-constitutional law would not, however, contravene Article 5(1) unless they were actually applied after the Constitution, though it might be argued that there was a possibility of applying such provisions and thus meting out unequal treatment.

In considering the problem as to whether, if the provisions of the Constitution are not retrospective, can an act done before the commencement of the Constitution (First Amendment) Act be still called into question on the ground that it now affects a fundamental right, Hamoodur Rahman J of the Pakistan Supreme Court, distinguished between the two positions. One where the acts had been done and completed before the fundamental right existed. Such acts cannot be reopened on the ground of inconsistency. Nor can the proceedings already commenced be stopped. Thus, he said, if a person had been convicted and sentenced prior to the coming into existence of the fundamental rights his conviction could not be set aside on that ground, because, the right had already been taken away and extinguished before the constitutional guarantee became available.⁶⁷

But the position, in his view, would, however, be different if the right was to be found to be still subsisting and capable of being enforced or there was still something left to be done to

Constitution of Pakistan, 1956 were to operate prospectively only, that is to say, with effect from the date of the promulgation of the constitution.

⁶⁷ *Saiyyid Abul A'la Maudoodi v. The Government of West Pakistan*, PLD 1964 SC 673 at p. 785. In *Lachmandas Ahuja v. State of Bombay*, AIR 1952 SC 235 it was held that though a person who has committed an offence before the commencement of the Constitution may be convicted and sentenced after the Constitution came into force, there must be no repugnancy between the procedure for such prosecution and any provision in the Constitution.

complete the extinction of the right even after the conferment of the fundamental rights. As for example, if a person was detained under a law, which provided for preventive detention without trial, before the incorporation of the fundamental rights, he would certainly be entitled to challenge the order then made for his detention if the detention continued even after the coming into force of the fundamental rights on the ground that the law under which his detention was ordered was inconsistent with the security of person guaranteed to him.

Difference in meaning of "Void"

What the word "void" means has been seen above while considering the effect of a declaration of unconstitutionality of a statute, but as that particular expression occurs in both clauses of Article 26, whether some difference in meaning exists as to the word used in both clauses may seem useful to consider.

It has been suggested before Courts in India that there is some difference in meaning between the expression "void" used in Clause (1) of Article 13 of the Indian Constitution and the same expression occurring in Clause (2) of the same Article. These two clauses correspond to the first two clauses of Article 26 of the Constitution of Bangladesh. In *Bhikaji Narain's* case⁶⁸ the Supreme Court of India, in interpreting Article 13 with reference to a pre-Constitution statute, observed that the expression "void" in Article 13(2) must be given the same interpretation as in Article 13(1). This view was followed in a subsequent case decided in the Patna High Court:

"Whether the law is post-Constitution or whether it is pre-Constitution the quality of the law is the same. Whether there is inconsistency under Article 13(1) or contravention under Article 13(2) the effect is identical in either case, namely, the law is 'void'. The expression occurs in both clauses (1) and (2) of Article 13 and there is no reason why same meaning should not be attributed to it in both parts. Fact that the law is

⁶⁸ AIR 1955 SC 781; *Mahendra Lal v. State of U. P.*, AIR 1963 SC 1019.

post-Constitution or pre-Constitution is not relevant, it is merely adventitious or extraneous circumstances.”⁶⁹

Though the meaning of the word “void” used in clauses (1) and (2) of Article 26 is the same, namely that the laws which are void are ineffectual and nugatory, some differences exist in this respect between a pre-Constitutional law and a law which is enacted in the post-Constitution period. “The voidness of the pre-constitutional laws is not from the inception. Such voidness supervened when the Constitution came into force; and so they existed and operated for sometime and for certain purposes; the voidness of post-Constitutional laws is from their very inception and they cannot, therefore, continue to exist for any purpose.”⁷⁰

⁶⁹ *S. M. Chhaya Devi v. Bihar*, AIR 1957 Pat 44.

⁷⁰ *Mahendra Lal v. State of U. P.*, AIR 1963 SC 1019.

CHAPTER THREE

RIGHT TO LIFE AND LIBERTY

Protection of Law—An Inalienable Right

Article 31 guarantees the inalienable right to enjoy the protection of the law and to be treated in accordance with law to two categories of persons : a citizen and secondly, every other person who is residing in Bangladesh. It further declares that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. An alien who is for the time being in Bangladesh is entitled to the protection of law, the expression 'law' obviously meaning the law of Bangladesh.¹

Article 31 does not merely embody the principle of the rule of law, as observed with reference to the corresponding Article 2 in the Constitution of Pakistan 1962,² but it confers a fundamental right to be treated in accordance with law. This article can be invoked only where a public or private right has been infringed.³ Right must be distinguished from a claim which is 'merely the assertion of a right'.⁴ Every officer or person must show some legal authority for interfering with a right of another person.

“Any invasion upon the rights of citizens by anybody, no matter whether by a private individual or by a public official or body, must be justified with reference to some law of the country.”⁵

¹ *Jose Gonzalo v. State*, PLD 1969 Lah. 129.

² *Narayan Das Cotton Ginning Factory v. Prov. of W. P.*, PLD 1969 Lah 860.

³ *Md. Sharif v. Md. Saeeduzzaman*, PLD 1968 Lah. 122.

⁴ *Syed Abdur Rashid v. Pakistan*, PLD 1962 SC 42.

⁵ *Md. Hussain v. General Manager*, E. B. Rly. PLD ¶1961 Dac 730; *Mir Hasan v. State*, PLD 1969 Lah. 786.

If an action which has been taken under the direction or order by the executive violates a citizen's right, it is liable to be declared invalid if he fails to justify his action with reference to some piece of legislation.

"A hangman must be equipped with a legal authority to hang, a jailor or a whipper with a legal warrant to imprison or whip, an officer or other person seizing another person's property with a legal warrant to seize or confiscate and a person who interferes with another person's right to carry on his trade, profession or business with a legal power to regulate or stop such activity."⁶

In considering the question whether, in view of the provisions of Section 38 of the National and Provincial Assemblies (Elections) Act, 1964 which prohibited the acceptance of a ballot paper bearing a mark by which the elector can be identified, the Member of the Election Commission had, by accepting ballot papers whose acceptance was so prohibited, acted illegally and without lawful authority, Kaikus J of the Supreme Court of Pakistan discussed the effect of Article 2 of the Constitution of Pakistan, 1962 upon the claim that the Government had inherent power to take action which was not subject to law or that it could deal with individuals in any manner which was not positively prohibited by law. Even, as he observed, "representative governments too have been claiming that in some spheres they possess powers of action which are not subject to law". While admitting that an act of the Government which can be categorised as what is known as an "act of State" may not be subject to municipal law, he negated the contention that there can be no such claim in respect of an action in relation to citizens. Kaikus J further observed that Article 2 not only prevented the Government from taking any action for which there was no legal sanction, but, most importantly, it debarred "the Legislature from creating an authority whose actions are not subject to law."⁷

In *Ghulam Zamin v. Khondker*⁸ which raised the question whether the validity of a certain Government notification which

⁶ Munir, *Constitution of Pakistan*, at p. 78.

⁷ *Jamal Shah v. Election Commission*, PLD 1966 SC 1.

⁸ PLD 1965 Dac 156.

was intended to impose legal obligation upon those who were carrying on "Pan" trade between the two Provinces of Pakistan, could be supported on the basis of a subsequent legislation, Murshed CJ expressed the view that it was not permissible to validate an order which would require a citizen to do something when such an order was not supported by a contemporaneous law. The executive authority of the State extended only to the execution of laws and there must be some law which enabled the Executive to function. Referring to Article 2 of the Constitution of Pakistan, 1962 which corresponds to Article 31, he said:

"The said Article is not a mere a rope of sands. The Article patently gives a constitutional protection; that is a protection *in praesenti*. Can there be any doubt that the term, 'law' as mentioned in Article 2 means a co-existent law? The invasion and the law which is supposed to justify it, must be co-related and co-existent. They must go together contemporaneously."

Further, no law could be made retrospectively validating an earlier executive action. He said:

"The guarantee that has been given by the Constitution cannot be washed away by an ingenuous legislative device which can wipe out an illegal invasion of to-day by an artful enactment of to-morrow, pretending to act retrospectively, without any constitutional change to that effect."⁹

The views of Murshed CJ do not find support in some of the cases decided by the Courts elsewhere.

Article 55(2) of the Constitution provides that "the Executive power of the Republic shall, in accordance with the Constitution, be exercised by or on the authority of the Prime Minister." Incidentally, it may be noticed that the usual legal fiction employed by the framers of similar constitutions which vest the executive power in the President, but which is in fact, exercised by the Prime Minister, has been departed from in this Clause in favour of an explicit recognition of the inchoate or hidden reality that distinguishes the Parliamentary from the Presidential system of Government. Without concerning ourselves with the uniqueness of this feature, we may proceed to consider the aspects relating

⁹ *Ibid.*

to the nature of the executive power as determined by Clause (2) of Article 55.

It is difficult to give an exhaustive definition of what the "Executive power" includes and embraces. It is the residue of the power of Government which remains after the legislative and judicial power have been taken away. It extends to such matters as, the execution of laws, the maintenance of public order, the collection of revenues, the management of state property and nationalised industries and services, the direction of foreign policy, the conduct of military affairs and various other services such as, education, public health, transport and state insurance.¹⁰

The expression "in accordance with the Constitution" used in Article 55(2) may lend themselves to two constructions.¹¹ According to one view, the Executive may, in the absence of any contrary provision in the Constitution, exercise the executive power in any manner it thinks fit, provided it did not involve the exercise of legislative or judicial power, except what has been conferred upon it by the Constitution.

In speaking of the President's duty to see that "the laws are faithfully executed" the American Supreme Court held that it is not limited to the enforcement of Acts of Congress according to their express terms but also includes:

"The rights, duties and obligations growing out of the Constitution itself, our international relations and all the protections implied by the nature of the Government under Constitution."¹²

Here, the Supreme Court is seen to assign also such power as was not conferred upon him by the Constitution or any Congressional Act.

The other view is that every Executive action must be authorised by some provision in the Constitution or the law. In *Ghulam Zamin's* case Murshed CJ quite emphatically asserted

¹⁰ Halsbury's *Laws of England*, Vol. VII, 3rd Ed., para 409.

¹¹ Munir, *Constitution*, 1st Ed. at. p. 255. Munir CJ was commenting on Article 31 of the Constitution of Pakistan, 1962 which provided: "The Executive authority of the Republic shall be exercised by the President in accordance with the Constitution and law."

¹² *In Re : Neagle*, (1890) US 1.

that "there is no inherent power in the Executive except what has been vested in it by law and that law is the source of all power and duty."¹³

Some cases from different jurisdictions are seen to favour a middle course. From these cases it would seem that though legislative authorisation is normally required to enable the Executive to Act, but this does not invariably mean that it cannot Act where the exigencies of a particular situation require immediate action. This view has been supported by the Indian Supreme Court.

"The Executive Government, however, cannot go against the provisions of the Constitution or of any law...but it does not follow from this that in order to enable the Executive to function there must be a law already in existence and that the powers of the Executive are limited merely to the carrying out of these laws."¹⁴

In saying so the Supreme Court was not unmindful of the necessity to protect the citizen's rights:

"Specific legislation may indeed be necessary if the Government require certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed."¹⁵

- 13 PLD 1965 Dac 156. Support for the views expressed by Murshed CJ is found in the following paragraphs in Halsbury's *Laws of England*, 3rd Ed., Vol. VI, paras 424 and 425. "The structure of the machinery of Government, and the regulation of the powers and duties which belong to the different parts of this structure, are defined by the law, which also prescribes, to some extent the mode in which these powers are to be exercised or those duties performed."

"From the all pervading presence of law, as the sole source of governmental powers and duties, there follow these consequences :

- (1) The existence or non-existence of a power or duty is a matter of law and not of fact, and so must be determined by reference to some enactment or reported case....."
- (4)Consequently there are no powers or duties inseparably annexed to the executive Government."

14 *Ram Jawaya Kapoor v. The State of Bombay*, AIR 1955 SC 549.

15 *Ibid.*

In the *Youngstown Sheet and Tube Company v. Sawyer*¹⁶ which came up for consideration before the American Supreme Court, and involved the question whether, in the absence of any law, the President had the power to take over the Nation's steel mills in order to protect them against a nationwide strike, the Court declared the President's assumption of power as unconstitutional. In the opinion of the majority of the Judges the Labour Management Relations Act, 1947, known as the "Taft Harley Act", which empowered the Executive to act in a national emergency, did not vest the President with the power to seize the citizen's property. The Executive has no inherent or residual power under the Constitution. The Court's opinion proceeded on the theory that the President is without power to seize private property even though an emergency exists. In the words of Black J, "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." Clark J, however, expressed in favour of "a residual or resultant power above, or in consequence of his granted powers, to deal with emergencies which he regards as threatening the national security." His views were that, in the absence of action by Congress to deal with the type of crisis which confronted the President, his independent power to act turns upon the gravity of the situation confronting the Nation, but that, when Congress has, as in the present case, laid down specific procedures to deal with such a crisis, the President must follow these procedures.

In determining the question whether the legislature could retrospectively validate an Executive order passed earlier, the Lahore High Court was attracted more by the views expressed by the Indian Supreme Court in *Ram Jawaya's* case and the observations made by the judges of the American Supreme Court regarding the President's independent power to take anticipatory action where "the imperatives of events and contemporary imponderables" demanded it, for, in the opinion of Chauhan J, the American Supreme Court did not at least rule out the theory

¹⁶ 343 US 579 (1951).

that the President had a power to take action in a national emergency. He said:

“This view will tend to maintain coherence in the State, avoid confusion and chaos and will make working of the executive smooth ; because otherwise to insist for a statute with regard to every trifling act of the executive will be well nigh impossible.¹⁷

Within the limitations imposed by the legislature the Executive has the power to frame rules, orders, bye-laws etc., but whether, in exercising such power, it has acted with lawful authority is within the power of the Superior Court to examine it. Under Article 102 of the Constitution, the Court is empowered to control the Executive if, in making such rules, orders and notifications, it acts in an arbitrary manner. In repudiating the argument built up on the authority of an English case¹⁸ that where a person is detained under a law, e.g. Defence of Pakistan Rules 1965, “satisfaction” of the detaining authority under Rule 32 is subjective and its reasonableness cannot, therefore, be examined by a Court of law, the Supreme Court of Pakistan was averse to allow the Executive freedom to make itself the final judge of its satisfaction for imposing restraints on the enjoyment of fundamental rights by the citizens. It expressed the view that Article 2, which corresponds to Article 31 of the Constitution of Bangladesh, would be deprived of all its content and the judicial power would be reduced to a nullity “if laws are so worded or interpreted that the executive authorities may make what statutory rules they please thereunder.”¹⁹ It admits of no doubt that the Supreme Court, while construing the relevant provisions of the Defence of Pakistan Ordinance and Rules thereunder, differed from the interpretation of similar provisions in the Defence of India Act and Rules by the Judicial Committee in *Sibnath Banerjee's* case.²⁰

Mention may be made that though Article 31 of the Constitution is based on Article 2 of the Constitution of Pakistan

¹⁷ *Mohd. Sharif v. Saeed-uzzaman*, PLD 1968 Lah 122 at p. 135.

¹⁸ *Liversidge v. Anderson*, 1942 AC 206.

¹⁹ *Ghulam Jilani v. Government of West Pakistan*, PLD 1967 SC 373.

²⁰ L. R. 72 I. A. 241.

1962, the latter was not one of the fundamental rights guaranteed under that Constitution, it was a mere solemn declaration.²¹ Nonetheless, in some cases it has been held that the violation of rights provided under Article 2 of that Constitution was guarded against by the remedy provided in Article 98 of the same Constitution.²²

Article 2 which came up for discussion in one of the well-known cases involving the liberty of a citizen,²³ even though it was not declared a fundamental right and could not, therefore, be so construed, earned a distinct merit. With the efflux of time its significance became clearer to the judicial sight and it grew conscious that though Article 2 did not embody a fundamental right, it was not a mere declaration in the Constitution of the citizen's right without any right to enforce it. From the expressions "in an unlawful manner" used in Article 98(2)(b), the Supreme Court found meaning and content to the declaration made under Article 2.²⁴ If an act of the executive authority is challenged, such act in the present case being detention, the Court had to see whether the act was done in an unlawful manner. In the words of Hamoodur Rahman J:

"Law is here not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the Superior Courts. It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law."

He further went on to say:

"It is in this sense that an action which is *mala fide* or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not action in accordance with law. Action taken upon no ground at all or without

²¹ *Md. Yusuf v. Chief Settlement & Rehb. Commsr.*, PLD 1968 SC 101.

²² *Mehboob Ali Malik v. Province of West Pakistan*, PLD 1963 Lah 575 (F. B.); *S. M. Yusuf v. Collector of Customs*, PLD 1968 Kar 599.

²³ *Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri*, PLD 1969 SC 14.

²⁴ Constitution of Pakistan, 1962. The same expression has been retained in the corresponding Article of the Constitution of Bangladesh, i.e. Article 102 (1) (b) (i), as amended by the Constitution (Fourth Amendment) Act, 1975.

proper application of the mind of the detaining authority would also not qualify as action in accordance with law and would, therefore, have to be struck down as being action taken in an unlawful manner.”

If an order is passed against a person without giving him the opportunity to show cause, it will not be an order in accordance with law. Even if, there is no provision for giving such notice in the law under which such action is proposed to be taken, the principles of natural justice requiring a show cause notice must be read into the statute which deals with the taking away of the citizen's rights. Thus, where the police resorted to opening the history sheet and entering the name of a person in surveillance register as provided in the Punjab Police Rules, 1934 without giving him an opportunity to show cause, the Court observed that such a person suffered in his right to reputation, and to some extent right to liberty as well. In doing so the Police, it was held, infringed the well-established rule contained in the maxim, *audi alteram partem*.²⁵

Article 31 has not taken away the powers of the legislature to make laws to affect past transactions.²⁶ Article 31 does not contain a prohibition against the making of laws with retrospective effect in respect of matters specified therein. Thus, in referring to the corresponding provisions in the Constitution of Pakistan, 1962, Cornelius CJ said:

“We do not conceive that the Article was intended to produce so wide an effect in relation to the well-established practice of retrospective or retro-active legislation.”²⁷

Since the right to the protection of law and to be treated in accordance with law has been guaranteed as a fundamental right by Article 31, it necessarily implies that the Supreme Court, in enforcing this right, has the power to determine what the law is whenever a challenge that it has been violated is made against the

²⁵ *Meraj-Uddin v. Senior Suptd. of Police*, PLD 1970 Lah 569.

²⁶ *Mir Ahmad Nawaz Khan v. Suptd. Jail*, PLD 1966 SC 357; *Amirullah v. Parsu Ram*, PLD 1967 SC 289; *Muhammad Sharif v. Saeeduz-Zaman*, PLD 1968 Lah 122; *Arif Iftikhar v. Lahore Improvement Trust*, PLD 1969 Lah. 1087.

²⁷ *Muhammad Yusuf v. Chief Settlement & Rehabilitation Commsr.* PLD 1968 SC 101.

action or decision of any person. A "person" as mentioned in Article 102 of the Constitution includes a statutory public authority and any court or tribunal, but does not include a court or tribunal established under military laws or under Article 117 of the Constitution.²⁸

Deprivation of Life or Personal Liberty

Article 32 of the Constitution guarantees that no person shall be deprived of life or personal liberty "save in accordance with law."

The corresponding provision in Article 21 of the Indian Constitution uses the phrase "except according to procedure established by law." This phrase was borrowed from the American-made Japanese Constitution, where, presumably, it imports the American doctrine of procedural due process, that is to say, a law under which a person may be deprived of life or liberty must, to be enforceable, provide that he is given notice of the offence with which he is charged and that he is given the opportunity to show cause against deprivation. The draft Indian Constitution used the expression "except by due process of law", but the drafting committee recommended the substitution of the phrase accepted by the Constituent Assembly, on the ground that it was "more specific". Notwithstanding that, in the circumstances explained, there was some force in the argument that the phrase "except according to procedure established by law" imported the American doctrine of due process, the Indian Supreme Court rejected it, holding that the phrase was unambiguous, and must be literally interpreted; it meant "procedure laid down by statute"; a person cannot be deprived of life or liberty at the discretion of an executive authority; it can only be done in accordance with procedure laid down in a statute.²⁹

²⁸ Article 102, Clause 3, as amended.

²⁹ *Gopalan v. Madras*, AIR (1950) SC 27; *Collector v. Ebrahim*, AIR 1957 SC 688; *Ram Chandra v. State of Bihar*, AIR 1961 SC 1629; Article 32 cannot be invoked by a person who has been deprived of his personal liberty by a private individual, *Vidaya Verma v. Dr. Shiv Nandan Verma*, AIR, 1956 SC 108.

As the phrase used in the Constitution of Bangladesh is not that used in the Japanese Constitution, there is even less reason for thinking that it imports the American doctrine of due process. In a case decided under the Constitution of Pakistan, 1956 which dealt with the question now under consideration, it appears to have been assumed that no deprivation of life or liberty is permissible unless it is done in accordance with a 'law'.³⁰

In this case the Lahore High Court held that it had jurisdiction to interfere whenever a person whether he was a citizen or not was deprived of his liberty by any authority in flagrant violation of the law under which it purported to act. Here the authority acting under Section 3 of the Recovery of Abducted Persons Ordinance VII, 1949 took into custody a person who, in the opinion of the Court was not an abducted person.

Article 32 would, therefore, seem to afford no protection against "competent legislative action". 'Law' is not used to mean principles of natural justice outside the realm of positive law; it is equivalent to State-made law. However, the phrase seeks to restrain the hands of the executive in case of any possible attempt to deprive a person of his liberty otherwise than under the authority of a statute. If, in exercise of the inherent powers under Section 561-A of the Code of Criminal Procedure, the Supreme Court cancels the bail of a person accused of any offence the deprivation of his personal liberty cannot be said to be not in accordance with law.³¹

Courts in Bangladesh would, perhaps, in agreeing with judicial observations made in a case before the Dacca High Court regarding the applicability of the American "Due process clause", hold it inapplicable when they would be asked to interpret the provisions relating to fundamental rights including the one guaranteed by Article 32 with reference to American decisions based upon the said clause.³² In this case the Court was considering

³⁰ *Sakhi Daler Khan v. Superintendent*, PLD 1957 Lah. 813.

³¹ *Ratilal Bhanji v. Assistant Collector*, AIR 1967 SC 1939.

³² Views expressed in *Jibendra Kishore v. Prov. of E. P.*, PLD 1957 SC 9, were affirmed in *East & West Shipping Steamship Co. v. Pakistan*, PLD 1958 SC 41. The Lahore High Court followed these views while interpreting fundamental rights guaranteed by the Constitution of Pakistan, 1962.

whether the East Bengal State Acquisition and Tenancy Act, 1950 applied the equality clause in the 1956 Constitution.

In interpreting the phrase "in accordance with law" which occurs in Article 40 of the Irish Constitution³³ an attempt was made to reverse the unbroken trend of judicial opinions to the effect that the phrase meant 'in accordance with the ordinary legislation'. Gavan Duffy J expressed preference for attaching a higher meaning to the word 'law' than merely ordinary legislation. The case concerned determination of the validity of the internment provisions in the Offences Against State Act, 1939.³⁴ The Irish Supreme Court, however, refused to follow the higher meaning of the word 'law', and the acceptance of the position that the Irish citizen's personal liberty is as entirely at the mercy of the legislature as that of the subject of the British Crown seemed more favourable:

"The phrase "in accordance with the law" is used in several Articles of the Constitution, and we are of opinion that it means in accordance with the law as it exists at the time when the particular Article is invoked and sought to be applied.....A person in custody is detained in accordance with the provisions of a statute duly passed by the Oireachtas; subject always to the qualification that such provisions are not repugnant to the Constitution or to any provision thereof."³⁵

Meaning of Personal Liberty

"Liberty" is a comprehensive term. Its nature and quality are determined with reference to conditions under which it may be restricted in the interests of society or the State. Though the right to life and liberty is assumed its existence depends, in fact, upon either the law or the Constitution of the country concerned.

Under the English Constitution there is no formal guarantee of liberty except a few provisions in the ancient charters.³⁶

³³ "No citizen shall be deprived of his personal liberty save in accordance with law."

³⁴ *The State (Burke) v. Lenon and A. G.*, (1940) I. R. 136.

³⁵ *In re Offences Against the State Amendment Act*, (1940) I. R. 470.

³⁶ In the Magna Carta it was demanded that "no man shall be taken or imprisoned, disseised or outlawed, or exiled, or in any way destroyed

However, "the right to personal liberty", as Dicey says, "means in substance a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification."³⁷ The absence of a formal declaration is of little consequence to a British citizen.

"... personal freedom ... is secured in England by the strict maintenance of the principle that no man can be arrested or imprisoned except in due course of law...under some legal warrant or authority, and, what is of far more consequence, it is secured by the provision of adequate legal means for the enforcement of this principle."³⁸

In England, anybody can by appropriate judicial or legal proceedings protect himself against the slightest arbitrary encroachment on his liberty.

"In accordance with British jurisprudence no member of the Executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice." And it is tradition of British justice that judges should not shrink from deciding such issues in the face of the executive."³⁹

In England, courts usually cannot declare a law invalid because it seeks to deprive a person of his life or liberty. The subject cannot claim that "the law shall not be changed to his detriment. In other words, he has no 'absolute' rights which are guaranteed against an Act of Parliament. This is a consequence of the general principle that Parliament is sovereign."⁴⁰

In *Liversidge v. Sir John Anderson*⁴¹ Lord Wright while considering Regulation 188 of the Defence (General) Regulations, 1939, made the following observations as to the nature of liberty

save by the lawful judgment of his peers or by the law of the land." The Petition of Right, 1628, also contained protests against arbitrary imprisonment. The Bill of Rights, 1688 restricts King's arbitrary powers.

³⁷ Dicey, *Law of the Constitution*, p. 208, 1964 (10th Ed.).

³⁸ *Ibid*, p. 208.

³⁹ *Eshugbayi v. Govt. of Nigeria*, AIR 1931 P. C. 248; *Muhammad Ibrahim v. Government of Pakistan*, PLD 1960 Lah. 1073; *Jamal Shah v. Election Commission*, PLD 1966 SC 1.

⁴⁰ *Stephen's Commentaries*, Vol. 1, p. 545.

⁴¹ (1942) AC 206 at 260-261.

enjoyed by a British subject, the extent of powers exercised by the Parliament and the function of the Court in giving effect to legislation restricting the liberty of the subject :

“All the courts to-day are as jealous as they ever have been in upholding the liberty of the subject but that liberty is a liberty confined and controlled by law, whether common law or statute. It is, in Burke’s words, a regulated freedom. Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. The answer to the question what is the precise extent of the powers given is only to be found by scrutinizing the language of the enactment in the light of the circumstances and the general policy and subject of the measure. In the constitution of this country there are no guaranteed or absolute rights.”

Though the English judges, lawyers and legal theorists have unequivocally espoused the paramount sovereignty of Parliament, there are also words of caution for the Court when it has to construe the meaning of a statute which will admit of doubt, “it will not then be presumed that construction can be agreeable to the intention of the legislature, the consequences of which are unreasonable.”⁴² From this it becomes evident that though Blackstone does not in general accept the theory of judicial review, he is in favour of allowing the judge the freedom to interpret an Act of Parliament in such a manner as to discover its reasonable intention, for, in his view “every wanton and causeless restraint of the will of the subject, whether practised by a monarch, a nobility, or a popular assembly, is a degree of tyranny; nay, even laws themselves whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference without good end in view, are regulations destructive of liberty.”⁴³

Yet, in England, judicial review of legislation is not permissible. By way of interpreting a statute passed by the Parliament, the court has to merely bring out its true meaning and import, in other words, give effect to the intention of the Parliament as expressed therein.

The Fifth Amendment to the United States Constitution declares “no person shall be deprived of life, liberty or property

⁴² Blackstone, *Commentaries*, BK I, at p. 91, note 21.

⁴³ Blackstone, *Commentaries*, BK I, p. 126.

without due process of law.” The Fourteenth Amendment imposes a similar condition on the State authorities. The requirement of “due process of law” has concerned itself not only with the procedure by which an act is passed or enforced, but even the substance of the act itself. Justice and fairness are the requisite elements of due process of law. In the words of Mr. Justice Swayne of the United States Supreme Court, “liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny.”⁴⁴

Though some substantive prohibition exists under the due process clause, the Supreme Court judges nevertheless seem to have disagreed as to the extent and flexibility of the clause. Individual liberty was treated not as an absolute right to be maintained at any cost but to be always preserved and protected except when it causes harm to the general good. Unlike the British Parliament an Act passed by the United States Congress is not “law” unless it is in conformity with the due process clause. Thus, in 1855, the Supreme Court discussed the due process clause in the Fifth Amendment in terms of its procedural significance, upholding the constitutionality of an Act of Congress which authorised distress warrants as a summary means of collecting taxes. The Court observed:

“That the warrant now in question is legal process is not denied. It was issued in conformity with an act of Congress. But is it ‘due process of law?’ The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process “due process of law”, by its mere will.”⁴⁵

As in the case of Article 21 of the Indian Constitution, the framers of the Constitution of Bangladesh seem to have qualified

⁴⁴ *Slaughterhouse Cases*, 83 US (16 Wall) 36 (1872).

⁴⁵ *Murray's Lessees v. Hoboken Land and Improvement Company*, 59 US (18 How) 272, 276.

the expression liberty in Article 32 by the word "personal" by way of abundant caution so as to dispel the impression that the word 'liberty' had any reference to the seven democratic freedoms guaranteed in Articles 36 to 41. After considering the scope and meaning of the expression 'personal liberty' used in Article 21 of the Indian Constitution the majority of the Judges of the Indian Supreme Court felt inclined to view it as a "compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt in the several clauses of Article 19(1), which correspond to Articles 36 to 41 of the Constitution of Bangladesh.⁴⁶ 'Deprivation' which means total loss⁴⁷ has not, it seems, the same meaning as restraint of free movement guaranteed by Article 36.

Views were expressed that personal liberty, that is to say, freedom from physical restraint of person as by incarceration which was sought to be protected by Fundamental Right No. 1 in the Constitution of Pakistan, 1962, corresponding to Article 32, must be distinguished from restriction or partial control of the right to move freely.⁴⁸ Else, it was observed that the word 'deprived' would be inapt grammatically when used with reference to 'life'. Such interpretation would seem to be in accord with the principle "every clause of a statute should be construed with reference to the context and other clauses of the Act so as, as far as possible, to make a consistent enactment of the whole statute."

The same Judge who expressed the above views doubted whether the term 'liberty' would receive the same meaning as it received in the United States. His views of personal liberty which meant freedom from restraint or incarceration were unacceptable to Akram J who asserted that the personal liberty guaranteed by the Constitution included the right to go abroad for travel and to return to his country, but the right of free movement is not an

⁴⁶ *Kharak Sing v. State of U. P.*, AIR 1963 SC 1295.

⁴⁷ Blackstone, *Commentaries*, Book I, at p. 134.

⁴⁸ Per Mr. Justice Gul in *State Bank of Pakistan v. Syed Abul A'la Maudoodi*, PLD 1969 Lah 908.

absolute right. It is subject to and regulated by the provisions of any valid law in force.

If, under the provisions of a valid law, a person is deprived of his personal liberty, or, when so deprived, can seek the protection of the procedural safeguards ensured by Articles 32, 33 and 35 of the Constitution of Bangladesh, any objection that because he is, for such deprivation, unable to enjoy all or any of the freedoms guaranteed by Articles 36 to 41 and that such deprivation is, therefore, not legal would indeed seem very naive and improper. The former set of Articles which provide certain safeguards to all persons against any legislative or executive measure are directed against the State, while the latter set of Articles which confer certain freedoms upon the citizens only has at the same time put limitations on such freedoms. Judging from these viewpoints, it would seem that Mr. Justice Gul approached the problem of reconciling these Articles from a correct perspective.

Punishment For Retrospective Offences

Clause (1) of Article 35 provides a rule against retrospective criminal legislation. It secures to every person the protection against punishment for acts which have retrospectively been made offences. It prohibits *ex post facto* law in the sphere of criminal or penal legislation which means that no new punitive measure can be applied to "a crime already consummated, to the detriment or material disadvantage of the wrongdoer." An *ex post facto* law has been defined as a law which imposes penalties retroactively, that is, upon acts already done, or which increases the penalty for such acts.

There is a distinction between retrospective laws and laws⁴⁹ which are termed as *ex post facto*. But it is not fundamental. The former expression is used in respect of civil matters and the latter in respect of criminal matters which by their nature are more serious.⁵⁰

⁴⁹ *Narain Das v. Prov. of West Pakistan*, PLD 1969 Lah 860.

⁵⁰ *Nabi Ahmed v. Home Secretary*, PLD 1969 SC 599.

The bias against retroactive laws is an ancient one.⁵¹ The *Corpus Juris Civilis* contained several prohibitions illustrating the same principle. It defined retrospective law as "a law that looks backwards or on things that are past; and a retroactive law is one that acts on things that are past. In common use, as applied to statutes, the two words are synonymous, and in this connection may broadly be defined as having reference to state of things, existing before the Act in question." The *Digest* lays down the rule that the law-giver could not change his course of action to the injury of another person.⁵² The Code more clearly stated the principle that laws and customs should be given an operation on future transactions and that they could not be recalled to past facts unless it was stated expressly that they applied either to past time or to pending transactions.⁵³

The nature of an *ex post facto* law has been explained in the *Corpus Juris Secundum*:

"An *ex post facto* law is one which makes criminal and punishes an act which was done before the passage of the law and which was innocent when done, aggravates a crime or makes it greater than it was when committed, changes the punishment and inflicts a greater punishment than was prescribed when the crime was committed, or alters the legal rules of evidence and receives less or different testimony than was required to convict at the time the offence was committed. Further, an *ex post facto* law may be one which, assuming to regulate civil rights and remedies only, in effect imposes a penalty or the deprivation of a right for something which, when done, was lawful, deprives persons accused of crime of some lawful protection or defence previously available to them, such as the protection of a former conviction or acquittal or of a proclamation of amnesty, or, generally, in relation to the offence or its consequences, alters the situation of an accused to his material disadvantage."⁵⁴

⁵¹ From the case of Timokrates and the Athenian Ambassador, Sir Paul Vinogradoff drew the conclusion that the Greeks recognised the principle expressing opposition to retroactive laws. In that case the Ambassadors withheld payment of money owed to the city state, and were ordered to repay double the amount. Timokrates succeeded in enacting a law to relieve the Ambassadors of this penalty but due to the efforts of Demonthenes, the law was regarded as invalid because it was retroactive. *Outlines of Historical Jurisprudence*, 139.

⁵² *Corpus Juris Civilis*, Digest, 50, 17, 75.

⁵³ *Corpus Juris Civilis*, Code 1, 14, 7.

⁵⁴ Vol. 16-A, Article 435.

The English common law courts later applied this rule as a guide to the construction of statutes. In the United States also this rule was used as a principle for construction of statutes. But when this rule was united with the doctrine of vested rights it was identified with natural law and was responsible for working a constitutional limitation on governmental power.

In the United States Constitution it has been provided that 'no bill of attainder or *ex post facto* law shall be passed.⁵⁵ At the time of its insertion many thought that this would act as a ban on all kinds of retroactive legislation and the Congress would be powerless to take away rights that have already vested. But as early as 1798, it was laid down that the prohibition against *ex post facto* legislation applied only to retroactive penal legislation, and not to any legislation which impaired property rights.⁵⁶ Retroactive laws were held to be oppressive and unjust, and it was maintained that the essence of a law was that it be a rule for the future. The opinion of the Supreme Court in *Calder's* case is summarised in the judgment of Chase J:

"Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law. The former only are prohibited. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect."⁵⁷

⁵⁵ Article 1, Section 9, prohibits the passing of *ex post facto* laws by Congress, and Clause 3, Section 10 of the Article provides that no state shall pass any *ex post facto* law.

⁵⁶ *Calder v. Bull*, 3 Dall. 386.

⁵⁷ *Ibid.*, at p. 391. Chase J said: "I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. First, every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. Secondly, every law that aggravates a crime, or makes it greater than it was, when committed. Thirdly, every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. Fourthly, every law that alters the legal rules of evidence and receives less, or different testimony, than the law required at the time of the commission of the offence in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive."

He, however, stated that instances may be visualised where a law which related to a time antecedent to their commencement may retrospectively be enacted for the benefit of the community, and also of individuals. A great and apparent difference exists between making an unlawful act lawful and making an innocent action penal. Chase J pointed out:

“But I do not consider any law *ex post facto* within the prohibition that mollifies the rigour of the criminal law, but only those that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, or to commence at an antecedent time, as to save time from the statute of limitations, or to excuse acts which were unlawful and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be.”⁵⁸

And he added:

“I admit, an act unlawful in the beginning may, in some cases, become lawful by matter of after fact.”

In a number of cases it has been expressly stated that in the absence of an express command or necessary implication to the contrary the court will presume that a law is designed to act prospectively.⁵⁹ If no time is mentioned the rule is that a statute commences on the day of its enactment.

An act of the legislature may seem to violate the prohibition against *ex post facto* law but is may be within the legislative competence to enact such a statute. Thus, in *Hawker v. New York*⁶⁰ where a statute of the State of New York enacted that medical practitioners who had been convicted for offences mentioned in the Act would no longer be allowed to practice, it was held that the legislation did not become an *ex post facto* law with regard to a person who prior to such legislation was convicted for an offence prescribed in that Act. The court held that the statute was not enacted with the intention of enhancing the

⁵⁸ *Ibid.*; *Ratan Lal v. State of Punjab*, AIR 1965 SC 444.

⁵⁹ *Muhammad Bashir v. Province of West Pakistan*, PLD 1958 Lah 853; *Mir Hasan v. The State*, PLD 1969 Lah 786.

⁶⁰ (1898) 170 US 189.

punishment imposed on medical practitioners found guilty of crimes before it became law; it was within the police power of the state to prescribe tests of fitness for medical practitioners. Again, a statute which imposes a more severe penalty on old offenders than on first offenders for the same offence is not regarded as adding an additional penalty for the old offender's previous crimes; the heavier penalty is intended to punish more suitably and effectively his recent crime.⁶¹ The prohibition against *ex post facto* law does not apply to deportation, nor does it apply to detention of the insane or to forfeiture for non-payment of taxes.⁶²

In England, Parliament is competent to enact laws having a retrospective effect. Blackstone condemned this method of legislation in no uncertain terms:

"This is a still more unreasonable method.....which is called making law *ex post facto*; when after an action indifferent in itself is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it."⁶³

However, there is no such constitutional provision expressly forbidding retroactivity in England as is found in the American Constitution.

Bracton introduced into English common law the Roman law principle which expressed opposition to retroactive laws. Coke made this principle a maxim of the common law and gave it currency and acceptability. It is through his works that the courts in England appear to have become acquainted with it. The attitude that the courts began to take once the principle was established was that they would refuse to construe a statute so as to make it applicable to cases arising prior to the passing of the statute or to acts anterior to its passage.

⁶¹ *McDonald v. Mass*, 180 US 311 (1901)

⁶² Willis, *Constitutional Law*, p. 516 (1936). The *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal.

⁶³ 1 Blackstone, *Commentaries*, 46.

This principle was later on combined with the concept of natural justice and any violation of the same was regarded as working an injustice. Thus, Coke declared that no Act of Parliament should be construed in such a way as to do a man any damage when he was free from wrong. He further maintained that one was punished or injured if he were affected disadvantageously by the retroactive application of law.⁶⁴

One of the essential characteristics of laws was held to be its applicability only in the future. This principle of future applicability of laws along with the concept of natural justice referred to above resulted in strengthening the common law maxim which condemned retroactive legislation. Blackstone pointed out that all laws should be made to operate in future because it is reasonable that they be prescribed or promulgated and there can be no promulgation where they commence at a time anterior to enactment.⁶⁵

Every member of the society expects the law to be steadfast and reliable. Thus, in *Phillips v. Eyre*⁶⁶ Mr. Justice Willes observed:

“Retrospective laws are, no doubt, *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated, ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.”

In his opinion the court will not, therefore, ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature. But to affirm that it is naturally or necessarily unjust to take away a vested right of action by act subsequent, is inconsistent both with the common law of England and the constant practice of legislation.”

He cites instances of this principle from private transactions, such as, when a stranger acting without authority commits a trespass in the name and for the benefit of an absent person,

⁶⁴ 2 *Inst.* 292.

⁶⁵ 1 Blackstone, *Commentaries*, 46.

⁶⁶ *Queen's Bench Cases*—1, 23 (1870-71)

such professed agent becomes liable for his unauthorised act, but the principal may afterwards ratify and adopt it:

“such ratification has the effect of a prior authority, and the result is, that if the prior authority of the principal would not have justified the act, both the agent and the principal may be sued as trespassers; and that, if such authority would have justified by matter *ex post facto*, the vested right of action is extinguished.”

This principle is equally applicable to the exercise of sovereign authority

“whereby the act of the agent, though originally unlawful, becomes after ratification an act of state, the original right of action is divested, and all civil liability is extinguished.... The statute book of every Parliament in this century contains an Act or Acts of Indemnity or otherwise retrospective laws by which numerous rights of action have been swept away.”

Though retrospective legislation is, in his opinion, generally unjust,

“There may be occasions and circumstances involving the safety of the state, or even the conduct of individual subjects, the justice of which, prospective laws made for ordinary occasions and the usual exigencies of society for want of provision fail to meet, and in which the execution of the law as it stood at the time may involve practical public inconvenience and wrong, *summa jus summa injuria*. Whether the circumstances of the particular case are such as to call for special and exceptional remedy is a question which must in each debate and decision in the Parliament which would have had jurisdiction to deal with the subject matter by preliminary legislation, and as to which a court of ordinary municipal law is not commissioned to inquire or adjudicate.”

While construing a statute retrospective operation should not be given to it as in that case it would affect an existing right or obligation. The following observation in *In Re Athlumney*⁶⁷ refers to this principle:

“No rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.”

In *King v. Chandra Dharma*⁶⁸ the question was whether the provisions of the impugned Act (Section 27 of the Prevention of Cruelty to Children Act, 1904) extended the period of limitation for instituting a prosecution for an offence under the provisions of an earlier Act from three months to six months. It was held by Lord Alverstone CJ that the statute did not alter the character of the offence or take away any defence which was formerly open to the prisoner. It was a matter of procedure, and according to all the authorities no objection can be taken to a procedural statute on the ground that it applied to offences alleged to have been committed before its enactment. It was observed:

“The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective.”

In similar words Humphreys J remarked that where a statute altered the rights of persons or imposed obligations on persons, it ought not or be held to be retroactive in its operation unless the words were clear, precise and quite free from ambiguity.⁶⁹

In matters of criminal law, retrospective effect can be given only by an Act of the Legislature, a validating Act, and not by the executive orders of Government.⁷⁰ An enactment ought not to be construed in such a way as to give it a retrospective operation, particularly in the case of a criminal matter, unless the language of the statute indicates such intention of the Legislature.⁷¹ The principle that the Legislature is presumed to enact prospectively and not retrospectively is, though of general application, followed with particular strictness so far as penal laws are concerned.⁷²

About the rule “*nulla poena sine lege*” which means no persons shall be punished except in pursuance of a statute which fixed a penalty for criminal behaviour, Sir Ivor Jennings summarises the position in English law:

“If may be noted that English law does not entirely satisfy these rigorous rules. The category of crimes is determined by general

⁶⁸ (1905) 2 KB 335 at 338.

⁶⁹ *Director of Public Prosecutions v. Lamb*, (1941) 2 KB 89 at 100.

⁷⁰ *Nawab v. Emperor*, AIR 1943 Sind 39 (FB)

⁷¹ *Chuni Lal v. Corpn. of Calcutta*, AIR 1933 Cal 732.

⁷² *Pars Ram v. Emperor*, AIR 1931 Lah 145.

rules, though this does not prevent Parliament from making special exceptions (as by Act of Attainder) if it wishes to do so, nor does it prevent Parliament from delegating the power of making new crimes, as in the Emergency Powers Act, 1920 (though subject to many safeguards). Laws may be made retrospective, though Parliament rarely does so. The courts may create new common law misdemeanours, as they created "public mischief", which are necessarily retrospective. Nevertheless all concepts of this character are vague, and it is the general tendency or spirit of the law and its administration which matters."⁷³

As stated by Sir Ivor Jennings, the rule includes at least four notions. First, it means that the category of crimes should be determined by general rules of a more or less fixed character. Secondly, it implies that a person should not be punished except for a crime which falls within these general rules. Thirdly, it may mean that penal statutes should be strictly construed, so that no act may be made criminal which is not clearly covered by the statutes. Fourthly, it may mean that penal laws should never have retrospective effect.

The concluding portion of the Latin maxim *nullum crimen sine lege* means that no conduct shall be held criminal unless it is specifically described in a penal statute.

Clause (1) of Article 35 prohibits conviction or penalty under an *ex post facto* law, whether the same is a pre-Constitution law or a post-Constitution law.⁷⁴ What is prohibited is the conviction or penalty under an *ex post facto* law and not the trial thereof:

"Such trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time cannot *ipso facto* be held to be unconstitutional."⁷⁵

The expression "law in force" which occurs in this clause is to be understood "in its natural sense as being the law in fact in existence and in operation at the time of commission of the offence as distinct from the law 'deemed' to have become operative

⁷³ *The Law and the Constitution*, 5th Edition, at p. 51.

⁷⁴ *Shiv Bahadur v. State of Vindhya Pradesh*, AIR 1953 SC 394.

⁷⁵ *Ibid.*

by virtue of the power of the Legislature to pass retrospective laws.”⁷⁶

Clause (1) of Article 35 contains an exception to the proposition that the legislature can pass laws with retrospective effect and nullifies its power to pass “laws which have the effect of making punishable an act which was not so punishable at the time of its commission.”⁷⁷ Here, the petitioner was prosecuted under the penalty clauses contained in section 167 (8), (81) of the Sea Customs Act which were amended after the Constitution of Pakistan, 1956, came into force and the alleged offence was committed.

In *Syed Akhlaque Husain, Advocate*,⁷⁸ the Constitutional validity of the Legal Practice (Disqualifications) Ordinance, 1964 which disqualified an Advocate or a Pleader from practising before any Court, authority or tribunal if such a person held office as a Supreme Court Judge or a High Court Judge (except that a High Court Judge was, after retirement or resignation, allowed to practise in the Supreme Court) was raised. Previous to the promulgation of this Ordinance certain former Judges including the Chief Justice of West Pakistan High Court had resumed practice at the Bar. It was decided that the Ordinance was invalid *qua* the petitioners as, in the opinion of the Court, no qualification could be imposed retrospectively. The argument that the Ordinance imposed a punishment on retired Judges as it seemed to have debarred them from the pursuit of a lawful avocation was, however, found not acceptable, for, it was felt that “it would be straining the language of Fundamental Right No. 4 (corresponding to Article 35 (1) of the Constitution of Bangladesh) beyond the limits of what is permissible.”

An amendment of the provisions of an election law, the National and Provincial Assemblies (First Election) Order, 1962, sought to impose a penalty on the petitioner in respect of an act

⁷⁶ *Ibid.*

⁷⁷ *Hasan Ali v. Collector of Land Customs*, PLD 1957 Lah 147. The correctness of the conclusion reached in this case has been doubted by Munir CJ in *Kalipada Saha v. The State*, PLD 1959 SC 322.

⁷⁸ PLD 1965 Lah 147 at 168.

which was committed by him long before the law was changed and it could not, therefore, be given retrospective operation.⁷⁹

When an election tribunal acting under section 53(1)(i) of the Electoral College Act, 1964 applied the provisions of an earlier law, namely, President's Order No. IV of 1962, which had declared the non-submission of election return an 'illegal practice' (but which was not an 'illegal practice' within the meaning of the aforesaid Act) and set aside the election of the petitioner, questions arose whether the disqualification thus imposed amounted to punishment and as such hit by Fundamental Right No. 4. In giving an affirmative answer Murshed CJ, of the Dacca High Court, quite pertinently observed that "a qualification imposed with regard to the membership of an Assembly may operate as a punishment, if, upon conviction, in relation to a pure election offence, a greater penalty is inflicted than what was permissible at the time when the said offence was committed. The position will also be the same if subsequently the penalty imposes a more onerous burden than what was previously inflicted upon him."

Further, if the disqualification was a mere domestic wall to bar entry into an elective body, it might not come within the mischief of the fundamental right providing protection against retrospective punishment. But, as in this case, the petitioner was, upon conviction for not submitting an election return, sentenced to pay a fine of rupees fifty and expressly exempted from incurring any disqualification on the said ground from contesting an election, it cannot be held that he incurred such disqualification on the selfsame ground on a pretended application of another law. 'The Constitution bars the imposition of a retrospective punishment'.⁸⁰

In repelling the argument that since Section 10 of the West Pakistan Co-operative Societies and Banks (Repayment of Loans) Ordinance, 1960 which made the contravention of any of its provisions punishable with imprisonment for a period which may

⁷⁹ *Jamalus Sattar v. Chief Election Commissioner*, PLD 1964 Dac 788.

⁸⁰ *Saheb Mia Chowdhury v. S. M. Mia*, PLD 1966 Dac 439 at 442.

extend to seven years and with fine was not in existence when the petitioners contracted the loans from the respondent bank, it created *ex post facto* penalties, and is, therefore, hit by the Constitutional principle against retrospective punishment, it was observed that the said penalty being in respect of any default to pay instalment after the Ordinance came into force and not in respect of any act or omission prior to its coming into force cannot be said to have violated such principle.⁸¹

Double Jeopardy

Clause (2) of Article 35 provides that no person shall be prosecuted and punished for the same offence more than once. The principle is derived from the maxim '*Nemo debet bis vexari*' which means that a man must not be put in peril twice for the same offence.

While referring to historical sources in support of his conclusion that fear and abhorrence of governmental power to try people twice for the same offence are one of the oldest ideas of the Western civilisation, Mr. Justice Black of the U.S. Supreme Court, in a dissenting judgment, stated that "double prosecutions for the same offence are so contrary to the spirit of our free country that they violate even the prevailing view of the Fourteenth Amendment, expressed in *Palko v. Connecticut*."⁸²

If a person is indicted for the same offence in a court of law in England, he can plead as a complete defence his former acquittal or conviction, or as otherwise expressed, take the plea of 'autre

⁸¹ *Ghulam Muhammad v. The Deputy Registrar*, PLD 1968 Lah 758.

⁸² *Bartkus v. Illinois*, 359 US 121 (1959). The double jeopardy clause of the Fifth Amendment to the U. S. Constitution provides—"nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." "A plea of former jeopardy must be upon a prosecution for the same identical offence. The test of identity of offences is whether the same evidence is required to sustain them; if not, the fact that both charges relate to one transaction does not make a single offence where two are defined by the statutes. Where a person is convicted of a crime which includes several incidents, a second trial for one of those incidents puts him twice in jeopardy."

fois acquit' or 'autre fois convict'. The ambit and scope of the guarantee ensured by Clause (2) are, however, narrower than those of the English common law or the American doctrine of 'double jeopardy'.⁸³

The proceedings contemplated in this clause are of the nature of criminal proceedings pending before a court of law or a judicial tribunal and there must be prosecution and punishment for the same offence. Thus, the proceedings before the Customs Authorities is not a 'prosecution' within the meaning of this clause.⁸⁴ 'Prosecution' means an initiation or starting of proceedings either by way of indictment or information in the criminal courts in order to put an offender upon trial.⁸⁵ The prosecution must be with reference to the law which creates the offence and the punishment must also be in accordance with what that law prescribes.⁸⁶ The word 'offence' used in the clause means what has been defined in the General Clauses Act as "an act or omission made punishable by the law for the time being in force."

As a Collector of Customs is not a court, neither the rule of autre fois acquit embodied in Section 403 of the Code of Criminal Procedure nor the issue estoppel rule can be invoked by a person against whom proceedings were instituted before him.⁸⁷

The rule of issue estoppel prevents relitigation of the issue which has been determined in a criminal trial. It means that "where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of the accused, such a finding would constitute an estoppel or *res judicata* against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different

⁸³ *Venkataraman v. Union of India*, AIR 1954 SC 375.

⁸⁴ *Maqbool Hossain v. Bombay*, AIR 1953 SC 325; *Asstt. Collector v. L. R. Melwani*, AIR 1970 SC 962; *Advani v. State of Maharashtra*, AIR 1971 SC 44.

⁸⁵ *Thomas Dana v. Bombay*, AIR 1959 SC 375.

⁸⁶ *Venkataraman v. Union of India*, AIR 1954 SC 375.

⁸⁷ *Assistant Collector v. L. R. Melwani*, AIR 1970 SC 962.

offence which might be permitted by the terms of Section 403, Criminal Procedure Code.”⁸⁸

As no trial is held in proceedings instituted under Section 107, Criminal Procedure Code, nor is any order of conviction or acquittal made thereunder, but only an order binding over the respondents to keep the peace was made, it was held that the rule of issue estoppel cannot be extended so as to prevent the reception of evidence which was given in that proceedings in their trial for the specific incident which together with the other incident was sought to be made the basis of the order of binding them over.⁸⁹

The limitation imposed by Clause (2) would seem to apply when the accused is placed in jeopardy twice for the same offence. It does not prevent prosecution for a separate offence although the accused had already been tried for another offence having relation to the same subject matter. When a statute makes possession and sale of liquor separate offences and prescribes separate punishments for each of the two offences, the prohibition in this clause will not apply though the same liquor may be involved in both offences.⁹⁰

Public Trial by an Independent Tribunal

Clause (3) of Article 35 guarantees to every person accused of a criminal offence the right to a speedy and public trial by an independent and impartial tribunal or court. There was no corresponding provisions in the Constitutions of Pakistan of 1956 and 1962. The Sixth Amendment to the U. S. Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.

The due process clause of the Fourteenth Amendment to the U. S. Constitution secures the right to public trial in a criminal

⁸⁸ *Piara Singh v. State of Punjab*, AIR 1969 SC 961. “The maxim ‘*Res judicata pro veritate accipitur*’ is no less applicable to criminal than to civil proceedings”, per Lord MacDermott in *Sambasivan v. Public Prosecutor*, (1950) AC 458.

⁸⁹ *State of Andhra Pradesh v. Kokkiligada*, AIR 1970 SC 771.

⁹⁰ *Albrecht v. U. S.*, 273 US 1 (1927) ; *U. S. v. Williams*, 341 US 58 (1951).

proceeding initiated by a state. *In re Oliver*⁹¹ the conviction of a witness for contempt by a judge was held invalid on the ground that the proceeding was conducted in secret. The purpose of public trial as required by the Fourteenth Amendment was "to guarantee that the accused would be fairly dealt with and not unjustly condemned. History had proven that secret tribunals were effective instruments of oppression."⁹² This observation came from Mr. Justice Clark while considering the question whether the petitioner who was convicted for swindling was deprived of the right to the due process clause by the televising and broadcasting of his trial. Since the chief function of the judicial machinery is to ascertain the truth, the use of television in court room cannot be said to contribute materially to this objective. Some of the numerous situations in which its use may cause actual unfairness, "some so subtle as to defy detection by the accused or control by the judge", were enumerated in this case. After reviewing the development of the fair trial concept at the common law and the Court's interpretation of the provisions in the Constitution respecting trials, Chief Justice Warren said that the use of television violated the Sixth and Fourteenth Amendments. He based his conclusions on three grounds: (1) that the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials; and (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others."⁹³

The Privilege Against Self-Incrimination

Under Clause (4) of Article 35 a person who is accused of any offence cannot be compelled to be a witness against himself, or in other words, the clause prohibits "all forms of physical, legal or

⁹¹ 333 US 257 (1948).

⁹² *Estes v. Texas*, 381 US 532 (1965).

⁹³ *Ibid.*

moral compulsion utilised to make a man convict himself.” The right guaranteed by this clause is a right pertaining to a person accused of an offence, and provides a protection against compulsion to be a witness against himself and also affords protection against such compulsion which may result in his giving evidence against himself.⁹⁴ A person who is arrested by a Customs Officer because he is found in possession of smuggled goods is not, when called upon by the Customs Officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of this clause.⁹⁵ A person stands in the character of an accused when a First Information Report is lodged against him before an officer competent to investigate, or when a complaint is made before a Magistrate competent to try or send to another Magistrate for trial of the offence. To be a witness in its grammatical sense means giving oral testimony in court. The strict literal interpretation of the expression ‘to be a witness’ has now been given a go-by in favour of a wider meaning, namely, being a testimony in court or out of court by a person accused of an offence, whether orally or in writing.⁹⁶

A question arose before the Indian Supreme Court whether a person accused of an offence can claim the protection of the corresponding Article 20 (3) of the Indian Constitution with regard to his conversation tape-recorded by the police. In repelling the argument that had the appellant known that the police had arranged a trap, he would not have talked as he did, Bachawat J observed:

“Compulsion may take many forms. A person accused of an offence may be subject to physical or mental torture. He may be starved or beaten and a confession may be extorted from him. By deceitful means he may be induced to believe that his son is being tortured in an adjoining room and by such inducement he may be compelled to make an incriminating statement.”

Since the conversation of the appellant was voluntary and there was no element of duress, coercion or compulsion, it could

⁹⁴ *M. P. Sharma v. Satish Chandra*, AIR 1954 SC 300 ; *Md. Dastagir v. Madras*, AIR 1960 SC 756.

⁹⁵ *Ramesh Chandra v. West Bengal*, AIR, 1970 SC 940.

⁹⁶ *State of Bombay v. Kathi Kalu*, AIR 1961 SC 1808.

not be said that he was compelled to be a witness against himself. In saying so, the Court was conscious that it did not lend its approval to "the police practice of tapping telephone wires and setting up hidden microphones for the purpose of tape recording."⁹⁷

The appellant against whom accusation has been made in a first information report charging him with offences in connection with smuggling of gold is a person accused of an offence, but he is not compelled to be a witness if he voluntarily gives evidence in his defence in proceedings started under Sections 111 and 112 of the Sea Customs Act. Different considerations would, however, arise if he is summoned by the Customs Authorities to give evidence in such proceedings.⁹⁸

In commenting upon the privilege against self-incrimination guaranteed by the Fifth Amendment to the U. S. Constitution,⁹⁹ Mr. Justice Douglas said :

"The Fifth Amendment outlaws torture. Though torture was long used to solve crimes, experience proved that it was not an honourable way for government to deal with its citizens. Even the miserable creature who has committed a heinous crime is a human being. Torture does not comport with the dignity of man."¹⁰⁰

The protection of Clause (4) of Article 35 is not merely available against the use of torture by the police, but can be claimed against all forms of compulsion which may be resorted to for making a man convict himself. No inference of lack of honesty can be drawn from invocation of the privilege "deemed worthy of enshrinement in the Constitution."¹⁰¹ For, the invocation of the privilege cannot be viewed as the confession of guilt. "A witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing."¹⁰² Conviction may not be based

⁹⁷ *Yusufalli v. Maharashtra*, AIR 1968 SC 147.

⁹⁸ *Tukaram v. R. N. Shukla*, AIR 1968 SC 1050.

⁹⁹ Fifth Amendment provides that "No person...shall be compelled in any criminal case to be a witness against himself."

¹⁰⁰ William O. Douglas, *The Right of the People*.

¹⁰¹ *Grunewald v. U. S.* 353 US 391 (1957)

¹⁰² *Slochower v. Board of Education*, 350 US 551 (1956)

upon evidence obtained by illegally breaking into the prisoner's room, struggling to open his mouth and remove what was there and by subjecting the prisoner to stomach pumping. If in a case of recovery of certain capsules containing narcotics, which were swallowed by the prisoner, by forcing him to vomit them, the attempt to distinguish between 'real evidence' and verbal evidence is recognised, it would be the same as ignoring "the reasons for excluding coerced confessions. In the words of Frankfurter J,

"Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct...would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalise the temper of a society."¹⁰³

Protection Against Inhuman Punishment

Clause (5) of Article 35 prohibits torture to the accused or the infliction of cruel, inhuman or degrading punishment or treatment upon him.¹⁰⁴ In determining the applicability of similar provisions in the American Constitution, it was observed by Reed J: "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688."¹⁰⁵ Though, in this case, the American Supreme Court held that the detention of the prisoner for carrying out a second attempt at execution by electrocution where the first attempt had failed due to some mechanical troubles, was not a denial of due process because of cruelty, the minority of the judges was of the view that

¹⁰³ *Rochin v. California*, 342 US 165 (1952). Sections 24 to 30 of the Evidence Act, 1872 contain provisions relating to the relevancy and admissibility of confessions. Section 164 of the Code of Criminal Procedure, 1898 provides the manner in which confessions and statements made by the accused are to be recorded.

¹⁰⁴ The Eighth Amendment to the U. S. Constitution provides "...excessive fines shall not be imposed nor cruel and unusual punishments inflicted." The Fourteenth Amendment prohibits execution by a state in a cruel manner.

¹⁰⁵ *Louisiana ex rel. Francis v. Resweber*, 329 US 459 (1947).

the repeated application of electrical shocks was a form of torture prohibited by the Constitution.

In *Robinson v. California*¹⁰⁶ the appellant was convicted for the violation of a State Act which made it an offence to use, or to be under the influence of, or be addicted to the use of narcotics, except when administered by or under the direction of the person authorised by the state to prescribe and administer narcotics. Since the statute did not aim to punish a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behaviour resulting from their administration, rather it made the 'status' of narcotic addiction a criminal offence, for which the offender might be prosecuted at any time before he reformed, the Supreme Court, in looking upon such addiction as a disease like mental illness, leprosy or venereal disease, viewed that "a law which made a criminal offence of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."

Protection Against Unreasonable Search and Seizure

Article 43 guarantees the right of privacy. Clause (a) of the Article extends this right to be secure in one's home against any unreasonable entry, search and seizure, and Clause (b) makes it available in respect of one's correspondence and other means of communication. This right was not provided under the Constitutions of Pakistan of 1956 and 1962.

Sections 102 and 103, 165 and 166 of the Code of Criminal Procedure contain the law regarding searches and seizures.¹⁰⁷

What value can be attached to the testimony of witness to search if they do not fulfil the requirement laid down in Section 103, Criminal Procedure Code raises controversy which, in the absence

¹⁰⁶ 370 U. S. 660 (1962).

¹⁰⁷ Rule 280 of the Police Regulations Bengal, 1943 contains some salutary provisions in aid of the aforesaid sections which, if followed scrupulously, would protect to a great extent the sanctity of home as well as secure respect for the individuals. *Panchu v. The State*, (1974) 26 DLR 297.

of any proof to show that "there were compelling or substantial reasons which necessitated the departure from the rule," may result in the release of the prisoner. If there is no satisfactory explanation for the non-observance of the requirement of "two or more respectable inhabitants of the locality" to witness search, the Court may draw the inference that "they (the police or excise officials) were prompted by a desire to have such witnesses as would be easily persuaded to support any story which might be put forward."¹⁰⁸

This right involves cases of wire-tapping and electronic surveillance which are used to pick up the confidences of private conversation.¹⁰⁹

Prohibition Against Forced Labour

Clause (1) of Article 34 prohibits all forms of forced labour and any contravention of this rule has been made punishable in accordance with law. Clause (2) prevents persons undergoing punishment for sentences given by a Court of law from invoking the prohibition against forced labour provided in the preceding clause and further the State is empowered to require compulsory services for public purposes. The Article does not expressly mention slavery as has been mentioned in the Thirteenth Amendment to the United States Constitution, and though there is no longer the remotest likelihood of enforcing such institution, the prohibition against forced labour would extend to it if at all any attempt is made to introduce it.¹¹⁰

¹⁰⁸ *Sardar Ali v. The State*, PLD 1964 Lah 386.

¹⁰⁹ The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures..." In cases so far decided by the American Supreme Court wire-tapping has been excluded from the scope of this Amendment, *Olmstead v. U. S.*, 277 US 438 (1928); *Goldman v. U. S.* 316 US 129 (1942); *On Lee v. U. S.*, 343 US 747 (1952).

¹¹⁰ Thirteenth Amendment, Section 1 "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The Slavery Act of 1843 provides that slaves shall not be sold in execution of decrees or orders or enforcements of any demand of rent or revenue, that no rights arising out of alleged property in slaves shall be enforced by the Courts, that no slave shall be dispossessed of or prevented from taking possession of property acquired by him, by his own exertions, or by inheritance or gift and that any act that would be a penal offence if done to a free man, shall be equally an offence if done to any person on the pretext of his being in a condition of slavery. This Act relieved all persons then subject to slavery from all the disabilities arising out of that status.

Ceremonies or tenets under which a person agreed to be the slave of another who is to become the master of the mind, property, body and soul of the other had, as a source of property or legal rights, no operation after the passing of the Slavery Act. In *Givaana v. Kandasami*¹¹¹ a gift was made of some disciples under the ceremony of *dattam* who devoted themselves, their soul, body and possession to *guru*. It was held that the ceremony could not be recognized as a source of property or legal right. This decision was followed in *Advocate-General v. Yusuf Ali*¹¹² where it was claimed that the *Mullaji* was, according to the tenets of a particular sect, the master of the minds, property, bodies and souls of his followers.

Section 374 of the Bangladesh Penal Code which lays down that "whoever unlawfully compels any person to labour against the will of that person, shall be punished . . .", would seem to be in keeping with the Constitutional principle against forced labour. In *Dubar v. Union*¹¹³ the question arose whether extra work of two hours by licensed porters at a railway station was forced labour within the meaning of Article 23 (1) of the Indian Constitution corresponding to Article 34(1) of the Constitution of Bangladesh. The petitioners had entered into a contract to that effect, were paid remuneration for two hours' labour, got the benefit of a reduced license fee and in addition were allowed the privilege of free user of the railway premises for earning their livelihood. It was observed that "the very idea that the

¹¹¹ (1886) 10 Mad 375.

¹¹² (1921) 24 Bom. L. R. 1060.

¹¹³ AIR 1952 Cal 496.

petitioners had voluntarily agreed to do extra work by entering into a contract to that effect repels the idea of their work being a forced labour."

In the *State v. Jorawar*,¹¹⁴ the respondent was fined by Tahsildar under the Chamba Paid Forces Labour Act because the former refused to carry a load of some Government property on being required to do so by the latter. It was said by the Court that conscription for the defence of the country, or for social services were possible instances of imposition of compulsory service for public purposes. The imposition of compulsory service for the purpose of carrying a load of Government property in normal times was, however, a different thing.

The system of 'begar' under which tenants were required to render occasionally compulsory service to the zeminders can no longer be enforced in view of the prohibition contained in Article 34 of the Constitution of Bangladesh.

Whether compulsory overtime work in any industrial establishment infringed Article 16 of the Constitution of Pakistan 1956, corresponding to Article 34, was considered in *Dalmia Cement Limited v. The Dalmia Cement Factory Workers' Union*.¹¹⁵ In this case under the Employment of Labour (Standing Orders) Act, 1946, every workman is bound, except on valid grounds, to work extra hours when required to do so provided that overtime working shall be regulated according to law. Section 47 of the Factories Act provides that where a worker in a non-seasonal factory works for more than nine hours a day or 48 hours a week, he shall be entitled in respect of overtime work to a payment at the rate of twice his ordinary pay. A workman was to continue to work beyond his shift if his reliever did not turn up or delayed in doing so. It was not alleged that extra remuneration was not being paid. It was observed that to work overtime in addition to his normal daily routine hours under a contract does not raise the question of forced labour attracting the letter or spirit of Article 16.

"When a person enters into a contract to perform a certain service it does not amount to forcing him to perform that service if he is held to

¹¹⁴ AIR 1953 Him. Pradesh 18.

¹¹⁵ PLD 1958 SC 153.

the liability under the contract. It was not contended that the workmen were not aware of the conditions of employment mentioned in the above Standing Order. It appears to me that the Union itself realised the weakness of their demand that compulsory overtime should be stopped and therefore modified its position by asking for better terms for such work, a point which the Tribunal did not consider apparently because it was not referred to it."¹¹⁶

Clause (2) of Article 34 has subjected the prohibition against forced labour to the State's requirement of compulsory service for public purposes. Where under a statute the state legislature has to levy taxes for the purposes of the State revenue, it would be justified in imposing obligation upon the citizens concerned to assist in the collection of those taxes as under Article 23 (2) of the Indian Constitution the State was enabled to impose compulsory service for public purposes.¹¹⁷ It would seem that compulsory work to build public highways,¹¹⁸ or compulsory military service¹¹⁹ would come within the exception provided under Clause (2) of Article 34 on the ground of public purposes.

In interpreting the scope of the Thirteenth Amendment to the United States Constitution the Supreme Court said that the purpose of the Amendment was not merely to end slavery but to maintain a system of completely free and voluntary labour throughout the country.¹²⁰ It does not prohibit forced labour as a punishment for crime,¹²¹ nor does it prevent a state from lawfully punishing the calling of a strike for an illegal purpose.¹²² The constitutionality of a state statute prohibiting strikes by public employees, in its application to employees of the municipal transportation system, was upheld.¹²³

¹¹⁶ *Ibid* at p. 157.

¹¹⁷ *Atma Ram v. State of Bihar*, AIR 1952 Pat 359; *S. Pratap Singh v. State of Punjab*, AIR 1964 SC 72.

¹¹⁸ *Selective Draft Law Cases*, 245 US 366 (1918); *Billings v. Truesdale*, 321 US 542 (1944).

¹¹⁹ *Butler v. Perry*, 240 US 328 (1916); *Dulal Samanta v. D. M.*, AIR 1958 Cal 365 at 372.

¹²⁰ *Pollock v. Williams*, 322 US 4 (1944)

¹²¹ *U. S. v. Reynolds*, 235 US 133 (1914)

¹²² *Dorchy v. Kansas*, 272 US 306 (1926)

¹²³ *City of Detroit v. Division 26 of Amalgamated Assn.*, 344 US 805 (1952).

CHAPTER FOUR

RIGHTS OF PERSONS UNDER ARREST AND DETENTION

Provisions of Article 33

Article 33 prescribes the limits of state control on deprivation of a person's liberty.¹ It affords to all persons, citizens or non-citizens certain constitutional guarantees in regard to punishment and prevention of crime and contains safeguards which are regarded as most vital and fundamental.² The Article comprises two limitations on the powers of the legislature. Clauses (1) and (2) lay down conditions with which laws providing for arrest and detention with the object of bringing a person to trial for a criminal offence must comply. Clause (3) expressly makes them inapplicable to enemy aliens. Clauses (4) and (5) impose certain limitations on legislation providing for preventive detention. Under Clause (6) the procedure to be followed by an Advisory Board in an inquiry under Clause (4) may be prescribed by an Act of Parliament.

The provisions of Article 33 require examination in some detail. Clause (1) says that after a person has been arrested, two conditions must be fulfilled. He must be informed of the grounds of arrest and he must not be denied the right to consult and be defended by a counsel of his choice. It is obvious that the arrest and detention of a person referred to in this clause must take place before his trial in a court of law.³ The words "nor shall he" occurring in this clause are not confined to a person

¹ This Article consisting now of Clauses (1) to (6) was substituted by the Constitution (Second Amendment) Act, 1973 on September 22, 1973.

² *Gopalan v. State of Madras*, AIR 1950 SC 27; *In re Madhu Limaye*, AIR 1969 SC 1014

³ *Jit Bahadur v. The State*, AIR 1953 All 753.

who has been arrested but includes a person who is in danger of losing his personal liberty.⁴

It may be mentioned that the Criminal Procedure Code contains provisions as to the right of an accused person to be defended by a pleader, and the right of a person arrested without warrant not to be detained more than twenty-four hours before being produced before a magistrate.⁵

Clause (2) provides that a person who is arrested and detained in custody must be produced before the nearest magistrate within twenty-four hours of his arrest, the time necessary for the journey from the place of arrest to the court being excluded; the authority of a magistrate will be required to detain a person beyond that period. Similar protection has been accorded to a person arrested either by a police officer or under the order of a magistrate under the Criminal Procedure Code.⁶

The two clauses together, thus, ensure the right to be informed of the grounds of arrest, the right to legal assistance, the right to be produced before the nearest magistrate within 24 hours and the right not to be detained beyond this period, save by order of the magistrate.⁷ The provisions of Article 33 are mandatory.⁸ The requirements of this Article are aimed at affording an earliest opportunity to the arrested person to

⁴ *State of Madhya Pradesh v. Shobharam*, AIR 1966 SC 1910.

⁵ Section 340 (1): "Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader."

⁶ Section 61: "No police officer shall detain a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167 exceed twenty-four hours exclusive of the time necessary for the journeys from the place of arrest to the Magistrate's Court." Section 167 provides for the production before a magistrate within twenty-four hours of any person in custody, and remands at discretion up to a total period of fifteen days.

Section 344 provides for similar remands by a magistrate during the trial if it cannot be completed.

⁷ *Gopalan v. Madras*, AIR 1950 SC 27.

⁸ *S. K. Abdul Karim v. State of West Bengal*, AIR 1969 SC 1028

remove any mistake, misapprehension, misunderstanding in the minds of the arresting authority.⁹ In considering the scope of the corresponding Clauses (1) and (2) of Article 22 of the Indian Constitution, the Supreme Court of India asserted that they gave three-fold protection to an arrested person.

“Article 22(1) is in two parts and it gives to persons arrested a two-fold protection. The first is that an accused person shall not be detained in custody without being told the grounds of such an arrest and the other is that he shall be entitled to consult and to be defended by a legal practitioner of his choice. Article 22 (2) gives a third protection and it is that every person arrested and detained in custody must be produced before the nearest magistrate within twenty-four hours, excluding the time necessary for the journey from the place of arrest to the court of the magistrate.”¹⁰

Meaning of Arrest

Arrest means “the placing of a person in custody or under restraint, usually for the purpose of compelling obedience to the law. If the arrest occurs in the course of criminal proceeding the purpose of the restraint is to hold the person for answer to a criminal charge, or to prevent him from committing an offence. In civil proceedings the purpose is to hold the person to a demand made against him.”¹¹

Several provisions of the Code of Criminal Procedure regulate the manner of effecting arrests, whether by a police officer or any private person.¹² The right of a private person to make an arrest may be contrasted to the power of a police officer to arrest without warrant. In the words of Cornelius CJ,

“By Section 54 of the Code, it is provided that a police officer may without warrant arrest any person against whom a reasonable suspicion exists of his having been concerned in a cognisable offence. The offence may be a bailable offence in this case; in the case of arrest by a private person it must necessarily be in a non-bailable offence. But the principal distinction lies in this that by virtue of

⁹ *In re Madhu Limaye*, AIR 1969 SC 1014.

¹⁰ *State of Madhya Pradesh v. Shobharam*, AIR 1966 SC 1910.

¹¹ *Encyclopaedia Britannica*.

¹² Sections 46, 48, 54, 55, 56, 57, 59, and 64.

his office, a police officer may act on reasonable suspicion, but a private person must act on the basis of something which has happened in his view.....The right of a private person to make the arrest at all is confined by Section 59 to the arrest of persons whom he actually sees committing a non-bailable and cognisable offence.”¹³

If a police officer merely shouts to one or more persons forming a crowd that he arrests them, this will not be a legal arrest.¹⁴ No question could, therefore, arise of the exercise of the right of private defence against him until all or any one of them was placed in immediate danger or restraint at the minimum level necessary for an arrest:

“When a person pleads the use of force in self-defence against unlawful arrest, he must show that he was in immediate apprehension of actual arrest in the form required by law, namely, by restraint upon his person.”¹⁵

There is no difference between detention by the police and formal arrest. “When a person is detained by the police, he is arrested. It is not necessary that in order to make the arrest legal he should further be handcuffed or put in the police or the judicial lock-up.”¹⁶

In considering the applicability of Clauses (1) and (2) of Article 22 of the Indian Constitution, which correspond to the first two clauses of Article 33, the Indian Supreme Court observed that arrests might be classified into two categories, namely, arrests under warrants issued by a Court and arrests otherwise than under such warrants and the language of Clauses (1) and (2) indicated that the fundamental right conferred by those clauses gave protection against such arrests as were effected otherwise than under a warrant issued by a court and to such persons as were taken into custody on any allegation or accusation of any actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or of any act prejudicial to the state or the public interest. In other words,

¹³ *State v. Mohd. Akbar*, PLD 1966 SC 432.

¹⁴ *Hamida Bano v. Ashiq Hussain*, PLD 1963 SC 109.

¹⁵ *Ibid.*

¹⁶ *Fazlur Rahman v. The State*, PLD 1960 Pesh 74.

they were designed to give protection against the act of the executive or other non-judicial authority. Accordingly, it was held that the physical restraint put upon an abducted person under Section 4 of the Abducted Persons (Recovery and Restoration) Act, 1949 did not constitute arrest and detention within the meaning of Clause (1) of Article 22.¹⁷

In repelling the argument based on this decision of the Indian Supreme Court, the Lahore High Court held that Article 7 of the Constitution of Pakistan, 1956, corresponding to Article 33, covered all arrests effected in criminal or quasi-criminal proceedings, including those made under orders of the criminal courts.¹⁸ Here, the Court was considering the Punjab Control of Goondas Act, 1951 which gave powers to a District Tribunal consisting of the District Magistrate and the Superintendent of Police to declare persons against whom information was laid by a police officer, goondas or dangerous goondas under Section 13 and to take other steps. The petitioners were arrested by order of the relevant Tribunal. In the opinion of the Court, Section 6(1) (g) empowering the Tribunal to proceed in the absence of the accused implied exclusion of his counsel, Section 7(2) enabling the Tribunal to keep part of the evidence secret, and Section 29 empowering the tribunal to maintain a secret record, made it impossible for any proper defence to be made with the help of a counsel and the above provisions of the impugned Act militated against Article 7(1) of the Constitution of Pakistan, 1956.

Dissenting from the view taken in the case of *Punjab v. Ajaib Singh* as to the meaning of "arrest" occurring in Article 7 (corresponding to Indian Article 22), the Court made the following observation:

"... this decision (*Punjab v. Ajaib*) takes too narrow a view of the corresponding provision in the Indian Constitution. The main

¹⁷ *State of Punjab v. Ajaib Singh*, AIR 1953 SC 10; in the case of *State of Madhya Pradesh v. Shobharam*, AIR 1966 SC 1910, the Indian Supreme Court noticed that in *Ajaib Singh's* case it gave a narrow interpretation to the word "arrest" as used in this Article. In *Raj Bahadur v. Legal Remembrancer*, AIR 1953 Cal 522, it was held that mere removal does not constitute "arrest" within the meaning of Article 22.

¹⁸ *Bazal Ahmad Ayyubi v. West Pakistan*, PLD 1957 Lah 388.

consideration that weighed with the learned judges there was that Criminal Procedure Code itself contains provisions giving the right of defence by a counsel of one's choice to an accused person and that a warrant issued by a Court would on its face contain the grounds of arrest such as are required to be communicated to him by Article 7 of our Constitution. They were able to hold that the detention of the person concerned would not fall within the definition of "arrest" at all. It is clear that the provisions of the Code of Criminal Procedure are subject to legislative amendment but fundamental rights guaranteed by the Constitution cannot be taken away by any enactment of the legislature. The scope of fundamental rights should not be cut down by the consideration that similar rights are conferred by the ordinary law."

Muhammad Shafi J of the Lahore High Court expressed his inability to accept the position laid down in the case of *Ajaib Singh*. He accepted it insofar as it laid down that Article 22 indicated that the fundamental right conferred by it gave protection against such arrests as were effected otherwise than under a warrant issued by a court, for he said, "the application of Article 7 cannot be attracted because it will be senseless to ask a Magistrate to apply his judicial mind to a case twice in twenty-four hours."¹⁹

When a person is arrested under a warrant, the warrant has to be issued by a court or a Magistrate. It must show the offence with which the accused is charged. On arrest the accused must be brought before the court without unnecessary delay and if after production before the Magistrate he is to be detained in custody, then the same procedure as in cases of arrest without warrant has to be followed.

The circumstances when a person is arrested in execution of a decree under Order XXI, Rule 37, of the Code of Civil Procedure and also under Section 55 and Order XXI, Rule 32 of the same Code were considered in *Sakhi Daler Khan's* case and it was observed that the application of the Article (Article 7) to these cases, both under the Criminal and Civil Procedure Codes "will be equally meaningless, because the judicial mind has once been brought about to bear upon it, and to bring it into play a

¹⁹ *Sakhi Daler Khan v. Superintendent-in-Charge, Recovery of Abducted Women*, PLD 1957 Lah 813.

second time will not serve any useful purpose". The case, however, failed to notice that there was nothing sacrosanct in the procedure provided by these Codes. They had been amended in the past and might as well be amended in the future. This fact was, however, pointed out in *Bazal Ahmad Ayyubi's* case.

The views expressed in *Ajaib Singh's* case that Article 22 gave protection against such arrests as were effected otherwise than under a warrant issued by a court, on the allegation or accusation or suspicion of commission of an act of any criminal or quasi-criminal nature or some activity prejudicial to the public or state interest, and not to other persons who were arrested under the orders of the executive or other non-judicial authorities did not find acceptance with the Court:

"This position in my humble view, would not emerge with credit from the test of pure reason. If their lordships' view is accepted, it will mean that while the criminals are afforded double protection, one under the Criminal Procedure Code and the other under the Constitution, the persons other than criminals are given no protection under the law against illegal arrest and detention....In fact Article 7 in cases of certain laws will contradict Article 5 (1) which will be an impossible position."

In the instant case, the petitioner's wife or alleged wife was arrested by the Police at her residence in Azad Kashmir and brought to a camp in Lahore established under the Pakistan (Recovery of Abducted Persons) Ordinance VII of 1949. The Court observed:

"The arrest and detention may be a fraud on the statute, a malice in law or in fact, it may be that the arrest or detention was an abuse of process of law and without any apparent authority. Should a person arrested and detained under the Ordinance be condemned to detention, simply because it is his or her misfortune, if it can be said so, that he or she is not a criminal and is only detained under the Ordinance....I cannot imagine for a moment that the law intended to afford no protection to these unfortunate creatures."

It was held that even if the petitioner's alleged wife was arrested and detained under the Ordinance, still as she had not been produced before a Magistrate so far, her detention

had been illegal. This view is, therefore, directly opposed to that expressed in *Ajaib's* case which laid down that the physical restraint on a person without imputation of criminality could not be regarded as arrest and detention within the meaning of Article 22(1), corresponding to Article 33(1).

When one considers the inadvisability of wasting the court's time in producing persons before it arrested under orders passed by the court itself, for example, in cases of judgment-debtors avoiding execution of the decree against him or lunatics or such other persons infringing any civil law, the proposition stated in *Ajaib's* case by the Indian Supreme Court itself, however, advised a caution in the application of their decision so as to avoid covering every conceivable kind of restriction on liberty.

"It is not our purpose, nor do we consider it desirable, to attempt a precise and meticulous enunciation of the scope and ambit of this fundamental right or to enumerate exhaustively the cases that come within its protection."

These words may be said to have clearly anticipated such protests as were made in *Sakhi Daler Khan's* case. However, it remains to be seen how the differences between the two views discussed above will be resolved in a future case arising in Bangladesh.

A person arrested in Bombay and taken in custody to Lucknow to be produced before the Speaker of the Uttar Pradesh Legislative Assembly to answer a charge of breach of privilege was held to be illegally detained as he was not produced before a Magistrate since his arrest.²⁰ This contravened the provisions of Article 22(2) of the Indian Constitution, which are peremptory in its terms.

The Indian Supreme Court, following its earlier decision in *Ajaib Singh's* case, held that an arrest under Section 48 of the Madras Revenue Recovery Act was not for any offence committed nor was it a punishment for defaulting in making payment of revenue. It was no more than a mode of recovery

²⁰ *Gunapati Reddy v. Nafisul Hasan*, AIR 1954 SC 636; *U. P. Legislative Reference case*, (1965) 1 SC 447.

of the amount due. Arrest and imprisonment of the defaulter under the above provisions could not be regarded as an arrest or detention within the meaning of Article 22.²¹

In a Pakistan case several persons of foreign nationality were arrested, initially on the charge of infringing an order of the civil authority debarring them under the provisions of the Foreigners' Order, 1951 from entering Pakistan, but later on the idea of punishment was abandoned, and they were detained with the sole object of deporting them to their own country. The Court pointed out the similarity between custody of this kind and custody of an abducted person with the object of restoring her to her kinsfolk and the physical restraint put on a defendant before judgment in a civil suit or on a judgment-debtor in execution of a decree. Steps taken and physical force applied for securing compliance with a legitimate order of deportation would be neither arrest nor detention for the purpose of Article 7, as such physical restraint would be neither punitive nor preventive nor malicious; it was legitimate.²²

Communication of Grounds and Production Before Magistrate

The reasons why a person being arrested should be told the grounds of his arrest have been clearly stated by Lord Simonds:

“Putting first things first, I would say that it is the right of every citizen to be free from arrest unless there is in some other citizen, whether a Constable or not, the right to arrest him. And I would say next that it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist unless that arrest is lawful. How can these rights be reconciled with the proposition that he may be arrested without knowing why he is arrested? Blind, unquestioning obedience is the law of tyrants and of slaves. It does not yet flourish on English soil.”²³

²¹ *Collector v. Ebrahim*, AIR 1957 SC 688.

²² *Jumma Khan Baluch v. Government of Pakistan*, PLD 1957 Kar 939; *State of U. P. v. Abdul Samad*, AIR 1962 SC 1506.

²³ *Christie v. Leachinsky*, (1947) AC 573; (1947) 1 AER 567; *In re Madhu Limaye*, AIR 1969 SC 1014.

But the true reason for disclosing the grounds of arrest seems, as stated by him, a different one. This appears from the following passage:

"If the charge on suspicion of which the man is arrested is then and there made known to him, he has the opportunity of giving an explanation of any misunderstanding or of calling attention to other persons for whom he may have been mistaken with the result that further inquiries may save him from the consequences of false accusation."

There is no need to formulate the grounds in a precise form. It will suffice if the accused understands why he is being accused:

"The charge need not contain the same accurate description of the offence as an indictment. Indeed, the precise charge need not be formulated, provided that the accused is told the act for which he is arrested."²⁴

Article 33(1) requires that a person must, on his arrest, be told why he is arrested. "A warrant of a Court and an order of any authority must show on their face the reason for arrest where there is no such warrant order, the person making the arrest must inform the reason for his arrest."²⁵ If it is possible to do this without acting contrary to the express provisions of the statute, it is not necessary to declare the statute void for repugnancy to Article 33.

This principle is also applicable to any law which does not provide for immediate production of the person arrested before the nearest magistrate.²⁶

When a person is arrested by the police he must be sent to the police station and not elsewhere and the Magistrate should not proceed to such place of confinement, instead of such person being brought to him for the purpose of remanding him to police custody. An undertrial prisoner who is remanded to police custody can be detained in a police lock-up which can be located only in a police station or post notified under Section 4(1)(s) of

²⁴ Prof. Glanville Williams, *Requisites of a Valid Arrest*, (1954) *Criminal Law Review* 6; *Vimal Kishore v. State of U. P.*, AIR 1956 All 56.

²⁵ *State of Madhya Pradesh v. Shobharam*, AIR 1966 SC 1910.

²⁶ *Khair Md. Khan v. Government of West Pakistan*, PLD 1956 Lah 668; *Behram Khan v. The State*, PLD 1957 Kar 709.

the Code of Criminal Procedure.²⁷ The Magistrate's proceeding to the place of confinement, as in the present case, is both illegal and violative of the Constitutional provisions relating to the production of the person arrested before a Magistrate.

To obtain an order of remand from a Magistrate, the actual production of the accused before him is necessary, but for subsequent orders of remand his production before the Magistrate is not necessary.²⁸ In case of an arrest and detention for the purpose of deportation, compliance with similar constitutional provisions has been held to be unnecessary by the Indian Supreme Court.²⁹

The expression "as soon as may be" denotes a reasonable period of time in the circumstances.³⁰

"The words 'as soon as may be' would normally produce effect before the prisoner is taken to a Magistrate, that is to say, within twenty-four hours. For, a prisoner is not produced before a Magistrate merely to inform him that there are Magistrates in the land, this one being the nearest of them in geographical proximity; he is produced so as to enable him to complain to the Magistrate if there is ground for any complaint. And the first complaint which a

²⁷ *The State v. Muhammad Yusuf*, PLD 1965 Lah 324. The following observations made in an Indian case over a hundred year ago were met with approval: "Moreover, even if a person be rightly arrested, it does not rest with the discretion of the police officer to keep the prisoner in custody where and as long as he pleases. Under no circumstances can he be detained without the special order of a Magistrate more than 24 hours. At the expiration of 24 hours, unless the special order has been obtained, the prisoner must either be discharged or sent on to the Magistrate, and any longer detention is unlawful, and though the Code is not so express upon the place as the time of confinement, still we think it is perfectly clear that it was intended that, where a police officer arrested any person, the prisoner should not be kept in confinement in any place which the subordinate officer might select, but that he should, if possible, be sent immediately to the police station, and be placed in the custody of the officer in charge of the station, who is the person entrusted by the Act with the conduct of the enquiry."

Views contrary to the decision in PLD 1965 Lah 324 were expressed in an Indian case: *Ram Monohar v. Suptd., Central Prison*, AIR 1955 All 193.

²⁸ *Pravat v. D. C., Kamrup*, AIR 1952 Assam 167.

²⁹ *State of U. P. v. Abdul Samad*, AIR 1962 SC 1506.

³⁰ *Tarapada v. State of West Bengal*, AIR 1951 SC 174.

prisoner will make will be: why have I been arrested? And if the Magistrate cannot tell him why, there is no charm in styling this production a fundamental right.”³¹

After considering the facts and circumstances of each particular case, the Court will be in a position to say whether the period within which the grounds were communicated is reasonable or not. No definite period can be laid down as reasonable and applicable in all cases.³² Failure to supply the grounds within a reasonable period will render further detention illegal.³³ Where the illiteracy of the persons arrested made it impracticable to communicate the grounds of arrest in writing, oral communication was held sufficient compliance with Clause (1) of Article 7 of the Constitution of Pakistan 1956, corresponding to Clause (1) of Article 33.

Communication must be in the language intelligible to the person arrested.³⁴

The arrest of a person by merely enumerating sections of any penal provisions is not proper compliance with Constitutional requirements as envisaged by Clause (2) of Article 33 because it does not give any information to the arrested person of the grounds for which he is deprived of his liberty. Therefore, merely by telling the person that he was being arrested under Section 7 of the Criminal Law Amendment Act and Section 143 read with Section 117 of the Penal Code, information is not provided to him as to which of the many unlawful acts he has committed.³⁵

Consultation and Assistance of Counsel

Reference may be made to a few American decisions which have considered the Sixth Amendment to the United States

³¹ *Ghulam Muhammad Khan Londkhawar v. State*, PLD 1957 Lah 497.

³² *Raj Bahadur v. Legal Remembrancer*, AIR 1953 Cal 522.

³³ *Murat v. Province of Bihar*, AIR 1948 Pat 135 (F. B.); *Mani v. District Magistrate*, AIR 1950 Mad 162.

³⁴ *Harikisan v. State of Maharashtra*, AIR 1962 SC 911; *Haribandhu Das v. D. M.*, AIR 1969 SC 43.

³⁵ *Madhu Limaye v. The State*, AIR 1959 Punj 506.

Constitution requiring that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence". Mention was made to some of these cases by the Dacca High Court in the leading case of *Moslemuddin v. Chief Secretary*.³⁶

It was held by the American Supreme Court that "counsel must be furnished to an indigent defendant in a federal court in every case, whatever the circumstances. Prosecutions in State Courts are not subject to this fixed requirement."³⁷ The right to have the assistance of counsel was held to have been violated where the court, in spite of the objection raised by the defendant, asked his counsel to represent also the case of a co-defendant whose interest might have been adverse to his.³⁸ Similarly, where a trial court, without giving notice to the defendant and consequently in his absence, assumed that the latter had given his consent to be represented by counsel who also appeared for another defendant, this right was violated.³⁹ On the other hand this right may be waived by an accused person when he is seen to possess sufficient intelligence to make an independent choice.⁴⁰ As to the right of counsel, the courts have "no power and authority to deprive an accused of his life or liberty unless he has or waived the assistance of counsel."⁴¹ But, as the right itself invokes the protection of the trial court upon which a duty has been cast to advise the accused of the right to counsel, the Court should not permit the waiver unless the same is judged to be an intelligent choice of the accused, having regard to the facts and circumstances of the case, including the background, experience and conduct of the accused. The Court's failure to provide assistance of counsel was regarded as jurisdictional.

³⁶ PLD 1957 Dac 101.

³⁷ *Foster v. Illinois*, 332 US 134 (1947)

³⁸ *Glasser v. U. S.*, 315 US 60 (1942)

³⁹ *U. S. v. Hayman*, 342 US 205 (1952)

⁴⁰ *Adams v. U. S.*, 317 US 269 (1942)

⁴¹ *Johnson v. Zerbst*, 304 US 458 (1938). This is a leading case on the right to counsel guaranteed by the Sixth Amendment.

A defendant's need for a lawyer has nowhere been more clearly stated than in the judgment of Sutherland J in *Powell v. Alabama*.⁴²

The petitioners were negroes charged with the crime of rape, committed upon the persons of two white girls. The trial judge had appointed all the members of the Bar for the purpose of arraigning the defendants and merely anticipated that they would continue to help them if no counsel appeared. The trial was completed within a single day. Under the state statute the punishment for rape, to be fixed by the jury, may in its discretion, be from ten years' imprisonment to death. The defendants were found guilty and death penalty was imposed upon them. Among the grounds upon which the judgments were assailed one specifically was that they were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial. Anderson CJ of the State Supreme Court who strongly dissented, said that "the record indicates that the appearance of the counsel (who attempted to represent the defendants) was rather pro forma than zealous and active". It was held by the American Supreme Court that, under the circumstances disclosed, the defendants 'were not accorded the right of counsel in any substantial sense'. Sutherland J who delivered the judgment observed:

"The right to be heard would be in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated lawyer has small and sometime no skill in the science of law. If charged with crime, he is incapable, generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."⁴³

⁴² 287 US 45 (1932).

⁴³ *Ibid.*

In a case which has been overruled in 1963 by the American Supreme Court, it was held that, apart from the cases involving capital punishment, the court was not under a duty to provide a counsel for defence in every case unless it could be shown that, in the absence of a counsel, fundamental fairness would be impaired.⁴⁴ In the opinion of Roberts J the Fourteenth Amendment did not embody "an inexorable command that no trial for any offence, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."

Just 21 years after this decision which rejected the contention that the due process clause of the Fourteenth Amendment provided a flat guarantee of counsel in state criminal trial, a fundamental question as to its rightness was raised in a case which arose out of a letter written by a prisoner with a pencil and addressed to the American Supreme Court.⁴⁵ A problem of the Constitutional right to counsel in state criminal trials had been "a continuing source of controversy in both State and Federal Courts". In overruling *Betts v. Brady* the American Supreme Court held that it had made "an abrupt break" from the precedents which had unequivocally declared that "the right to the aid of the Counsel was of fundamental character". Mr. Justice Black of the American Supreme Court observed:

"Not only these precedents but also reason and reflection, require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defences. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that

⁴⁴ *Betts v. Brady*, 316 US 455 (1942).

⁴⁵ *Gideon v. Wainright*, 372 US 335 (1963).

lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."⁴⁶

In applying the principle of *Gideon v. Wainwright* to a State case where the main question was whether the refusal by the police to grant the petitioner's request to consult his lawyer during the course of an interrogation constituted a denial of the defendant's right to "the assistance of counsel" under the Sixth Amendment "made obligatory upon the States by the Fourteenth Amendment", the U. S. Supreme Court held that it had been violated and thus his incriminating statements elicited by the police during the interrogation were rendered inadmissible.⁴⁷

In England, the accused had always in cases of misdemeanours, the right to be defended by counsel. The position originally was otherwise in case of treason and felony. Section 1 of the Treason Act, 1695 gave this right in treason and misprision of treason and Section 1 of the Trials for Felony Act, 1836 gave it in cases of felony. Before 1836, the accused person might, in case of felony, engage counsel to examine witnesses and argue points of law. Now, the accused person in all cases is entitled to be defended by counsel, or, at quarter sessions where solicitors have a right of appearance, by a solicitor. The Poor Prisoners' Defence Act, 1930, replacing the Poor Prisoners' Defence Act, 1903, provided for the grant of legal aid to a poor prisoner upon his obtaining a certificate from the court that he is unable to engage a lawyer. The 1930 Act has been amended and extended by Part II of the Legal Aid and Advice Act, 1949. Provision has been made therein for the grant of free legal aid to accused persons in certain circumstances. Apart from the provisions of these Acts if an accused person is not defended by counsel the judge may request any member of the bar to represent him. The law and practice followed in England were based on the assumption that equality before the law, meaning the 'right to sue and be sued' will be denied if any person takes part in legal proceedings undefended.

⁴⁶ *Ibid.*

⁴⁷ *Escobedo v. Illinois*, 378 US 478 (1964).

In a case before the Bombay High Court it was held that the provisions of Section 340 of the Code of Criminal Procedure extended to the cases not only of a person accused of an offence in a Criminal Court, but to the case of any person against whom proceedings were instituted under the Code in any court. That section gave the accused the right to be defended by a pleader when the proceedings were actually going on, and implied that he should have a reasonable opportunity, if in custody, of getting into communication with his legal adviser for the purpose of preparing his defence, unless there were exceptional circumstances. The Court held that under Section 340 the law was that access to legal advisers of the accused should be allowed before and irrespective of the charge sheet. This case represents the position before the Constitution came into force.⁴⁸ Now, Article 33 requires that an accused must have the opportunity of consulting his pleader, subject to reasonable conditions enabling those in whose custody he is to perform their functions, whether other circumstances are exceptional or not.

As has been observed in *Ajaib Singh's* case, "there can be no doubt that the right to consult a legal practitioner of his choice is to enable the arrested person to be advised about the legality or sufficiency of the grounds for his arrest."⁴⁹

The right to consult a lawyer implies that there is an accusation against him against which he has to be defended. Commenting on Section 340 (1) of the Code of Criminal Procedure, the Supreme Court of India thus observed:

"The right conferred by Section 340 (1) does not extend to a right in an accused person to be provided with a lawyer by the State, or by the police or by the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one and to engage one himself or get his relations to engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity."⁵⁰

⁴⁸ *In re Llewelyn Evans*, AIR 1926 Bom 551.

⁴⁹ AIR 1953 SC 10.

⁵⁰ *Tara Singh v. The State*, AIR 1951 SC 441.

From this it is obvious that the State is under no duty to provide legal assistance to an accused person. In another case before the Indian Supreme Court the position of the accused under Section 340(1) of the Criminal Procedure Code was stated in these words:

- “(a) That it cannot be laid down as a rule of law that in every capital case where the accused is unrepresented, the trial would be vitiated;
- (b) But that a court of appeal or revision is not powerless to interfere, if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of fair trial;
- (c) That where there was no question of want of means on the part of the accused and the accused did not avail of the opportunity of engaging lawyers, the trial was not vitiated on the ground that the accused were not represented by lawyer at the trial.”⁵¹

In a case before the Dacca High Court, in spite of representation by the counsel appointed by the State, the lack of opportunity to defend the prisoner who was sentenced to death was the sole ground urged for sending the case back for retrial. The counsel was appointed by the Court when, after the trial had started it discovered that the prisoner had no means to engage a lawyer and, curiously enough, the lawyer so appointed did not ask for an adjournment of the trial. Viewing that the circumstances showed that the prisoner's right to be properly defended was violated, Sayem J, as he then was, observed:

“A last minute appointment of an Advocate for defending a prisoner accused of a capital offence not only results in a breach of the provisions of the 6th Paragraph of Chapter XII of the Legal Remembrancer's Manual, 1960 and frustrates the object behind the elaborate provisions of that Chapter, such an appointment results also in a denial to the prisoner of the right conferred on him by Section 340 of the Code.”⁵²

In another case before the same Court, the question being substantially the same, Abdullah Jabir J while he agreed with the correctness of the principle laid down in *Purna Chandra's*

⁵¹ *Janardhan v. State of Hyderabad*, AIR 1951 SC 217.

⁵² *The State v. Purna Chandra*, (1970) 22 DLR (Dac) 289.

case, introduced a new element which sought to put the emphasis not so much on the fact of last minute appointment of a lawyer for the prisoner going undefended but upon the question whether he was prejudiced in his defence, which depended on the facts of each case.⁵³

The procedure to be followed by the Tribunal under the Punjab Control of Goondas Act, 1951 enabling it to keep secret certain portion of the information against the person complained against and to exclude the person concerned and record evidence in his absence, did not allow proper defence to be made and thus held to have infringed the right to defend and consultation.⁵⁴

Trials under the Frontier Crimes Regulation (III of 1901), so far as they were held under denial of right to consult and engage a counsel were held to be inconsistent with Article 7 of the Constitution of Pakistan, 1956 and were illegal.⁵⁵ It was further observed that Article 7 should be treated as a part of every law relating to trial for any offence....No evidence should be heard or recorded against the accused before they had been given an opportunity of defending themselves by a pleader. But Kayani J who delivered the judgment held that the Regulation was not unlawful on the ground that it did not provide for the appearance of a legal practitioner, for in such cases the provisions of the Constitution must be read into it.

In *Behram Khan v. The State*⁵⁶ the Frontier Crimes Regulation was impugned as infringing Article 7 of the Constitution of Pakistan, 1956 in that it did not enable an accused person to be defended by a counsel nor provided for his production before a Magistrate within 24 hours of his arrest. Citing with approval the conclusion in *Khair Md. Khan's* case that "if there is any provision in the Code (of Criminal Procedure) apart from the mode of trial, which can be applicable to a Jirga case, it shall be applied", Qaderuddin J observed:

"We...recognise the acceptance of the principles that the provisions of the Constitution, which form the superior law of the land, must

⁵³ *The State v. Abdur Rashid*, (1972) 24 DLR (Dac) 18. Recently, these cases were considered in *State v. Munna*, (1975) DLR 28.

⁵⁴ *Bazal Ahmad Ayyubi v. West Pakistan*, PLD 1957 Lah 388.

⁵⁵ *Khair Md. Khan v. Government of West Pakistan*, PLD 1956 Lah 668.

⁵⁶ PLD 1957 Kar 709.

be read into those laws which do not expressly or by necessary implication negative the observance and that declaration as void of neutral laws may be avoided, if necessary by issuing proper directions.”

Accordingly, in his opinion, Section 61 of the Code of Criminal Procedure could be said to be applicable to the proceedings under the Frontier Crimes Regulation and this applicability satisfied the Constitutional requirements under Article 7 (2) of the late Constitution of Pakistan, 1956 corresponding to Clause (2) of Article 33.

The legality or otherwise of the detention must be determined at the time of the return made before the Court. Where the return does not contain any information as to when and by whom the arrested persons were informed of the grounds of their arrest, nor does the State show that the circumstances were such that the arrested persons must have known the general nature of the alleged offences for which they had been arrested, they are entitled to be released on this ground alone.⁵⁷

The Food Control of Movement and Distribution Ordinance, 1956, was promulgated to meet the unusual circumstances arising from inundation and famine. It enabled special courts manned by military personnel to ensure speedy trial of certain kinds of offences.⁵⁸ The petitioner, who had been found in possession of food-stuffs in excess of the quantity to which he was entitled under Section 6 of the impugned Ordinance, was denied the right to consult and be defended by a legal practitioner. Murshed J, as he then was, compared the mode of trial before the special court, with that followed before ordinary courts of law in the following words:

“If the trial had taken place in an ordinary court, which are well-known to the members of the public and which are haunts of lawyers and where all the members of the public have, in fact, free access, the case might have been different. Here there was a trial not by an ordinary court but by a special Magistrate; the trial did not take place in well-known court premises; the Court was held in an unusual place and also in an unusual atmosphere.”

⁵⁷ *In re Madhu Limaye*, AIR 1969 SC 1014.

⁵⁸ *Moslemuddin Sikder v. Chief Secretary, Government of East Pakistan*, PLD 1957 Dac 101.

The circumstances were such that a reasonable man in the prisoner's situation would have despaired of any hope of exercising the right to consult a pleader. Thus, as Murshed J described, the person was arrested in the morning in his house in a village and was taken away from it to a distant place. His relatives, made frantic attempts to get in touch with him, but failed to do so, and he, on his turn could not contact them. From the moment of his arrest till he was lodged in jail after his conviction the prisoner got no opportunity to contact his friends or relatives. It was held that the right of counsel had been violated.

CHAPTER FIVE

PREVENTIVE DETENTION

Laws authorising the detention of a person without trial were considered necessary by the British Indian Government to suppress subversive political activities of the people in the sub-continent but after achieving independence the Governments of India and Pakistan continued these laws. The framers of the Constitutions of both India and Pakistan, however, provided certain limitations of the powers of the legislature as well as the executive in their attempt to detain a person without trial. In Bangladesh, these limitations have been provided in the Constitution by amending Article 33. Clauses (4), (5) and (6) which have been inserted by this Amendment contain the limitations. Before examining the nature of the Constitutional protection of the restrictive laws, the origin of such laws may be considered.

Preventive Detention in England

In England, the Executive claimed the right to arrest and imprison persons without trial only in two cases. First, it was claimed in assertion of the prerogative right. Secondly, it was exercised under powers delegated to the Executive by Parliament.

The exercise of the prerogative right was challenged in the case of the *Five Knights*¹ where the court held that, although if a cause had been stated, it could examine whether it was sufficient, and free the prisoner if it was not, if no cause at all were stated, other than the King's Special Command, then the subject had no redress. The prisoners were, however, released in 1628. When Parliament opened Coke introduced a Bill to make it unlawful to detain any person in prison for more than three months without

¹ 3 State Trials 1 (1627).

trial. In the debate that ensued the right of the subject to be immune from detention without being charged with an offence according to law and being found guilty was emphatically reaffirmed. The Bill of Rights, 1688 contains a similar reaffirmation. There was an Act of 1701 of the Scottish Parliament ensuring to Scotsmen similar security.²

In spite of these reaffirmations, in practice, during times of emergency, persons were detained without trial. Prior to the First World War this was done by suspending the Habeas Corpus Acts for a short time. In Blackstone's opinion these Habeas Corpus Suspension Acts were the only proper way of proceeding in a national emergency. The Coercion Act of 1881, which gave the Irish Executive an absolute power of arbitrary and preventive arrest and power to detain in prison any person arrested on suspicion for the entire period during which the Act remained in force, served as a model for the Executive in England to assume powers during the two world wars.

In the debate on Regulation 18B of the Defence (General) Regulations, 1939 the government put forward arguments which contradict each other: First, these powers have been delegated in their wide form to the Executive by Parliament, so the Executive cannot be blamed if it takes advantages of their amplitude, and secondly, the powers are not really arbitrary because Parliament controls their exercise. Professor G.W. Keeton says that

"both arguments cannot be right, and they conceal the fact that for the period of the war, our traditional liberties, dating back from Magna Carta, have been swept aside, and we have become a "police state."³

Under Regulation 14B made under the Defence of the Realm Acts passed in 1915 (the regulations under the two previous Acts being declared *ultra vires* by the courts and the third Act being condemned by such eminent persons as Lords Halsbury, Haldane,

² Mentioned by Lord Shaw in *R. v. Halliday*, (1917) AC 260.

³ *Mod. L. R.*, July, 1942, 162 at p. 166.

Bryce and Loreburn) persons could be detained without being brought to trial at all.⁴

In *Rex v. Halliday: Ex parte Zadig*⁵, the appellant, a naturalised British subject of German origin, who was interned under the regulations applied for a writ of *habeas corpus*. The question canvassed was whether the Defence of the Realm Act 1914-15 which empowered the executive to make regulations for securing the public safety and the defence of the Realm justified internment of a British subject without trial. Under the regulation the Secretary of State could detain a suspected person on the recommendation of an advisory committee presided over by a judge. The appellant argued that the regulation was *ultra vires* because, though the Defence of the Realm Act was sufficiently wide for the making of such a regulation which conferred unrestricted powers still it should be interpreted in favour of the subject. The majority of the Judges, Lord Shaw dissenting, considered that the regulation was not *ultra vires*.

The Act authorised provisions for prevention and for punishment. Persons who violated the Regulations will incur punishment. Persons of hostile origin and association could be detained. Lord Finlay (the Lord Chancellor) said:

"Any preventive measures, even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the state."⁶

During World War II the Emergency Powers (Defence) Act, 1939⁷, gave powers under which the Executive prepared

⁴ It ran—"Where on the recommendation of a competent naval or military authority or of one of the advisory committees hereinbefore mentioned it appears to the Secretary of State that for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any persons that he shall be subjected to such obligations and restrictions as are hereinbefore mentioned, the Secretary of State may by order require that person...to be interned."

⁵ (1917) AC 260.

⁶ *Ibid.*, at p. 265.

⁷ Section I—"The King may, by Order in Council, make such regulations as appear to him to be necessary or expedient for securing the public

Regulation 18B—"If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations. and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

In *Liversidge v. Anderson* the House of Lords had to consider the scope and meaning of Regulation 18B just referred to. Lord Maugham did not consider the rule that legislation dealing with the liberty must be construed, if possible, in favour of the subject and against the Crown relevant when construing an executive measure which aims at preventing a public danger when the safety of the State is involved.

"The language of the Act of 1939 shows beyond doubt that Defence Regulations may be made which must deprive the subject "whose detention appears to the Secretary of State to be expedient in the interests of the public safety" of all his liberty of movement while the regulations remain in force. There can plainly be no presumption applicable to a regulation made under this extraordinary power that the liberty of the person in question will not be interfered with, and equally no presumption that the detention must not be made to depend...on the unchallengeable opinion of the Secretary of the State. The legislature obviously proceeds on the footing that there may be certain persons against whom no offence is proved nor any charge formulated but as regards whom it may be expedient to authorize the Secretary of State to make an order for detention."⁸

In both *Halliday's* as well as *Liversidge's* cases the power with which the Court was concerned was 'to take preventive measures in the nature of internment which will last only for a limited time'. In both cases it was contended that the regulations

safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which his Majesty may be engaged, and for maintaining supplies and the services essential to the life of the community."

Sub-Section (2) provides that the Defence Regulation may include regulations "for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the Realm."

⁸ (1942) AC 206 at p. 219.

ought to be read with a limitation in favour of liberty, and in both of them the Judges refused to limit the natural meaning of the words.

Quite confidently and without any hesitation Lords Finlay⁹ and Atkinson¹⁰ observed in *Halliday's* case that the war emergency was a sufficient justification for such preventive measures. In the same case Lord Dunedin, concurring with the majority, said that preventive measures in the shape of internment of persons likely to assist the enemy might obviously be necessary, and Parliament had risked the chance of abuse which is always theoretically present when absolute powers in general terms are delegated to an executive body, thinking that the restriction of the powers to the duration of the war was a sufficient safeguard.¹¹

The same principle has found acceptance in the speeches made by the Judges in *Liversidge's* case. Lord Maugham's reasons for conferring of powers to exercise preventive detention on his own responsibility on the Home Secretary embody the same precedent.¹² Lord Wright did not accept the argument that the evils of the exercise of arbitrary powers of arrest by the executive are great in the circumstances they were conferred and to be exercised. In his opinion also there was no necessity for subjecting all such powers to judicial control. He said:

"All the courts to-day, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law whether common law or statute. It is, in Burke's words, a regulated freedom. It is not an abstract or absolute freedom. Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament, or a statutory regulation, like regulation 18B, which has admittedly the force of a statute, because there is no suggestion that it is ultra vires or outside the Emergency Powers (Defence) Act, under which it was made, is alleged to limit or curtail the liberty of the subject or vest in the executive extraordinary powers

⁹ (1917) AC 260, at p. 269.

¹⁰ *Ibid.*, at p. 271.

¹¹ *Ibid.*, at p. 271.

¹² (1942) AC 206 at p. 219.

of detaining a subject, the only question is what is the precise extent of the powers given.”¹³

In his opinion the answer to that question could only be found by ‘scrutinising the language of the enactment in the light of the circumstances and the general policy and object of the measure’. The English Constitution does not contain a declaration of the guaranteed or absolute rights, yet the courts in England would not countenance any arbitrary, despotic or tyrannous conduct.

“The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of the emergency.”¹⁴

In conclusion, the English Parliament has so far authorised preventive detention only during such emergency as two World Wars. Lord Macmillan in the same case said:

“The liberty which we so justly extol is itself the gift of the law of the land and, as Magna Carta recognized, may by the law be forfeited or abridged. At a time when it is undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country’s cause, it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention.”¹⁵

History of Preventive Detention in the Indian Sub-Continent

A brief history of the preventive detention laws will throw some sidelight on the significance of such laws as have been enacted in the Indian Sub-Continent.

With the Bengal State Prisoners’ Regulation III of 1818 the authority to detain persons without trial came to be first exercised in British India. In the next year the Madras State Prisoners’ Regulation II of 1819 and a few years after the

¹³ *Ibid.*, at p. 261.

¹⁴ *Ibid.*, at p. 257.

¹⁵ *Ibid.*, at p. 257.

Bombay State Prisoners' Regulation XXV of 1827 were promulgated. In the case of the Bengal Regulation the Governor-General and in the other two cases the Governors of the provinces were authorised to order detention and for this purpose they were invested with wide discretion. Provided the action taken was within the scope of the Regulation, the jurisdiction of a court of law to question the legality was barred.

However, the grounds on which detention could be imposed were limited. The Bengal Regulation provided for detention for "reasons of state, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of native princes entitled to its 'protection and the security of the British dominions from foreign hostility and from internal commotion.'" Under the other two Regulations detention could be ordered only on grounds connected with the maintenance of public order. Neither of these Regulations, however, fixed any period for detention, that is, a person could be detained without trial for unlimited time.

These Regulations, no doubt, were motivated by the principle 'no detention without statutory authority'. Though there were no provisions made for any advisory council and the detained person was given no right to be heard or informed of the grounds of detention, any representation made by him was to be submitted to the authority concerned.

We need not pause to consider the extension of the Bengal Regulation to the other provinces of British India and their contents and history. But the Defence of India Acts passed during the two world wars require mentioning. The Defence of India Act, 1915 was to remain in force during the continuation of the war and six months after the cessation of hostilities. Under the provisions of the Act, rules could be made empowering the civil as well as military authorities to direct any person to reside or remain in any specified area if they considered that reasonable grounds existed for suspecting any person to have acted or was about to act prejudicially to the public safety. Between

this enactment and the Defence of India Act, 1939, the Anarchical and Revolutionary Crimes Act, 1919, popularly known as the Rowlatt Act and several Emergency Powers Ordinances under the Government of India Act, 1919, were promulgated. The Defence of India Act, which authorised preventive detention without trial in British India was enacted under the provisions of the Government of India Act, 1935. It continued during the period of World War II and was in force till six months after the hostilities ended.

After the establishment of Pakistan the Central Statutes that were passed were Pakistan Public Safety Ordinance XIV of 1949, the Pakistan Public Safety (Amendment) Act XXXVI of 1950, the Pakistan Public Safety Ordinance VI of 1952 and lastly the Security of Pakistan Act XXXV of 1952. Besides these Central Acts, the Provinces enacted Public Safety Acts and Ordinances whose number exceeded more than a dozen.

The Security of Pakistan Act, 1952 made provisions for communicating grounds of detention to the detained person, enabling him to make representation and setting up an Advisory Board. The life of this Act was extended several times by Acts and Ordinances, and this Act was amended on several occasions, the last being Security of Pakistan (Amendment) Act, 1965. On September 6, 1965 when hostility started between India and Pakistan, the President of Pakistan promulgated the Defence of Pakistan Ordinance XXIII of 1965 in exercise the powers conferred by Clause (4) of Article 30 read with Clause (2) of Article 131 of the Constitution. Section 3 (1) and (2) empowered the Central Government to make rules which among other matters could provide for

“The apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain as the case may be, suspects, on grounds appearing to such authority to be reasonable, of being hostile origin, or of having acted, acting, being about to act, or of being likely to act in a manner prejudicial to the external affairs, the security, the public safety or interest, or the defence of Pakistan or any part thereof, including the maintenance of supplies and services essential to the life of the community, and the maintenance of peaceful conditions—in any area included in Pakistan, or prejudicial to the maintenance of public order, or the efficient

prosecution of war, or with respect to whom such authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do or abstain from doing anything."

The Defence of Pakistan Rules, 1965 which were framed under the Ordinance conferred extensive powers of detention on the Central Government and also gave wide powers of arrest and detention to the police officer or any other officer empowered in this behalf by general or special order of the Central Government.¹⁶ In Bangladesh, laws relating to preventive detention were enacted subsequent to the amendment of Article 33 of the Constitution. The Special Powers Act, 1974 which came into force on February 9, 1974 has incorporated the requirements laid down in this Article.

Nature of Preventive Detention

As has been observed in Gopalan's case "there is no authoritative definition of the term 'Preventive Detention'...." In England, while explaining the nature of detention under Regulation 14B, framed under the Defence of the Realm (Consolidation) Act, 1914, the Judges referred to such expression. Lord Finlay characterised it as not a punitive but a precautionary measure. "One of the obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy."¹⁷ When a person is preventively detained, such detention is not punitive.

"No offence is proved, nor any charge formulated; the justification of such detention is suspicion or reasonable probability and not criminal conviction which can only be warranted by legal evidence."¹⁸

¹⁶ *Rules 32 (b), 202 and 204.* After the Proclamation of Emergency on December 28, 1974 Emergency Rules framed in pursuance of the Emergency Powers Ordinance, 1974 contain similar provisions.

¹⁷ *Rex v. Halliday*, (1917) AC at p. 269.

¹⁸ *Gopalan v. State of Madras*, AIR 1950 SC 27.

The object of such detention is, however, not to inflict punishment for any act done by him but to prevent him from doing it. After observing how precious the personal liberty of the subject is, Lord Atkinson in *Halliday's* case found a justification for preventive detention during war, "there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement."¹⁹

In the same case his lordship defined preventive justice "which consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done...."

And such preventive justice proceeds "upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof."

Clauses (4) and (5) of Article 33 indicate that the preventive detention referred to therein is detention otherwise than by order of court. There is no scope of judicial review. This kind of preventive detention is quite distinct from that ordered under the provisions of the Criminal Procedure Code.²⁰ Like the detention pending trial dealt with in Clauses (1) and (2) of Article 33, the detention referred to in Clauses (4) and (5) is not punitive detention. The first two clauses, we have seen, lay down the minimum conditions which the legislature sanctioning the arrest and detention of a person not convicted of a crime must comply with and the safeguards provided therein were largely covered by the provisions in the Criminal Procedure Code.

Clause (3) specifically lays down that these safeguards will not be applicable in cases of persons who are for the time being enemy aliens or who are arrested and detained under any law

¹⁹ (1917) AC 260.

²⁰ *Jit Bahadur v. The State*, AIR 1953 All 753; *Mannava v. Punnaiah*, AIR 1957 And. Pra. 90.

providing for preventive detention. The preventive detention contemplated in Clauses (4) and (5) has reference only to detention made by an order of an executive authority purporting to act under an enactment authorising such detention.²¹

Chapter VIII of the Criminal Procedure Code contains such provisions as, (a) Taking security for keeping the peace—Section 106; (b) Taking security for keeping the peace even in cases where there has been no conviction—Section 107; (c) Taking security for good behaviour—Section 108. The Court may order detention in prison under Sections 107, 117 and 123 of the Code, but though this kind of detention is resorted to as a sort of precautionary measure, it is not a punitive detention. The fact that imprisonment follows as the result of a failure or refusal to give security does not make it a punishment inflicted for a crime.

An order for detention under the provisions of the Criminal Procedure Code is made by a magistrate for sufficient reasons established by the evidence and after full judicial enquiry. Here the detention can be avoided by giving security, while in preventive detention under an executive order there is no choice. Preventive detention deprives a person of his right to liberty without the advantages that a person detained under the above provisions of the Code enjoys or to his right of moving the Supreme Court in appropriate cases, and also his right to defence by counsel of his own choice. A detainee under a Preventive Detention law is not required to be produced before any Court. Chapter VIII deals with (1) persons disseminating seditious matter; (2) vagrants and suspected persons and (3) habitual offenders.

21 In considering the justification for similar provisions relating to preventive detention in the Indian Constitution, the Supreme Court of India observed: "That appears to have been done because the Constitution recognises the necessity of preventive detention on extraordinary occasions when control over public order, security of the country, etc., are in danger of breakdown. But while recognising the need of preventive detention without recourse to the normal procedure according to law, it provides at the same time certain restrictions on the power of detention, both legislative and executive, which it considers as minimum safeguards to ensure that the power of such detention is not illegitimately or arbitrarily used." *Pankaj Kumar v. State of West Bengal*, AIR 1970 SC 97.

In *Abdul Aziz v. Province of West Pakistan*²² the Supreme Court of Pakistan considered the meaning and application of Clauses (1) to (5) of Article 7 of the Constitution of Pakistan, 1956, corresponding to Clauses (1) to (5) of Article 33 of the Constitution of Bangladesh. According to Cornelius J, Clause (1) of Article 7 was "completely new law, of a detailed nature, applying to persons who have been arrested under any existing law" and was not required to be incorporated in every law providing for arrest of persons. Clause (2) merely repeated "with higher and all-embracing authority, certain provisions contained in the Criminal Procedure Code regarding production of an arrested person before a Magistrate within a precisely specified period of very short duration and that further must be under the orders of a Magistrate". This clause does not indicate that "its provisions are to be expressly incorporated in every law which provides for the arrest of persons". Clause (3) merely saved, from the operation of the first two clauses, persons who were enemy aliens and persons who were under preventive detention. Clause (4) did not contain any words from which one could infer that it sought to include, in every statute of the relevant kind, provisions for the appointment and functioning of an Advisory Board. As was observed by Cornelius J, the clause "would be understood as being aimed at detentions under law and not at the law under which the detentions have been ordered". Clause (5) did not "authorise the making of laws", nor did it "impose conditions upon the making of laws

22 PLD 1958 SC 499. These clauses impose on the detaining authority the obligation to furnish the grounds for detention, the obligation to afford the detainee the earliest opportunity of making a representation against the order and the obligation to constitute an advisory board and not to keep him in detention for a period longer than six months unless before the expiry of this period it obtains the opinion of the board that there is sufficient cause for such detention. *Pankaj Kumar v. State of West Bengal*, AIR 1970 SC 97; *Khairul Haque v. State of West Bengal*, (1969) 2 SC. W. R. 529. The scope and effect of the corresponding clauses in Article 22 of the Indian Constitution have been considered in *Puran Lal v. Union of India*, AIR 1958 SC 163; *Sk. Abdul Karim v. State of West Bengal*, AIR 1969 SC 1028.

relating to preventive detention". It did not require that its provisions were to be incorporated in any law of the relevant kind.²³ Clause (5) of Article 33 enacts positive law, effecting preventive detention, which must be read as supplementing the provisions of any statute existing in the same field.²⁴

Externment or banishment is akin to preventive detention insofar as this is also a precautionary measure and its object is not to punish but to prevent. Its justification is also suspicion or reasonable probability. Even so, it was held that externment or banishment was not detention, for, the latter meant that the person detained was not at liberty to go anywhere.²⁵ In this case a person was externed from Delhi under the provisions of the U. P. Act I of 1932 (as extended to Delhi) which did not provide for preventive detention.

A person can be preventively detained only under a provision of law. Preventive detention "makes an inroad on the personal liberty of a citizen without the safeguards inherent in a formal trial before a judicial tribunal and....it must be jealously kept within the bounds fixed for it by the Constitution and the relevant law".²⁶ If the law under which he is detained is pronounced unconstitutional and invalid he is to be at once set at liberty. Brett LJ observed:

"It is a general rule, which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."²⁷

Advisory Boards

The constitution of an Advisory Board for the purpose of reporting to the government its opinion whether a person should

²³ *Ibid.*

²⁴ *Govt. of East Pakistan v. Rowshan Bijaya*, PLD 1966 SC 286.

²⁵ *Inderjit Singh v. State of Delhi*, AIR 1953 Punj 52.

²⁶ *Ibid.*

²⁷ *Enraught's case*, (1881) 6 QBD 376. In *Ram Krishna v. State of Delhi*, AIR 1953 SC 318, the Indian Supreme Court observed: "Preventive detention is a serious invasion of personal liberty and such meagre

be detained for more than six months may be said to have been 'introduced for the very reason that review by the law courts was excluded'. This is, no doubt, a special procedure but this shows that the person detained has not been left without any safeguard. Further, this elaborate provision for safeguarding the detained person's interests may be regarded as an argument against holding that absolute discretion has been conferred on the government. "The setting up of an Advisory Board to determine whether such detention is justified is considered as a sufficient safeguard against arbitrary detention under any law of preventive detention."²⁸

The Advisory Board stands perhaps midway between the court and the executive. It has the power of going through the records of a case but it will not be bound to hear any arguments addressed by a counsel on behalf of a detained person. If it reports against detaining a person any further he will be at once set free. And no law can be passed for detention of a person exceeding six months unless the Board reports before the end of such a period that he may be detained for a longer period.

Thus, in a case decided under the Constitution of Pakistan, 1956 it was held that the constitutional provisions limiting detention without trial to a period not exceeding the period mentioned therein, unless in the opinion of the Advisory Board sufficient cause for such detention exists, need not be inserted into every statute. "Clause (4) of Article 7 of the Constitution of Pakistan 1956 (which corresponds to Clause (4) of Article 33) does not hit a statute of the relevant kind either on the point of competence or that of content, but applies in respect of the operation of such statute. The clause like every other clause in Article 7, contains nothing in the way of a direction obliging the insertion of its provisions in every statute of the relevant kind. The clause imposes a condition upon the power of detention without trial vested in authorities under existing law,

safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court."

²⁸ *Puran Lal v. Union of India*, AIR 1958 SC 163.

viz., that the satisfaction of the detaining authority regarding the need for detaining a particular person shall not by itself be sufficient for continuing that detention beyond an initial period of three months, unless an Advisory Board, as prescribed, has concurred in the opinion held by the detaining authority in that respect.”²⁹

On the arrest of Sayyid Abul A’la Maudoodi and forty-three other members of the Jama’at-i-Islami under Section 3 of the West Pakistan Maintenance of Public Order Ordinance No. XXXI of 1960, objections were raised as to its validity on two grounds, *inter alia*, that the Ordinance was repugnant to the Constitution and, secondly, that the constitution of the Advisory Board was illegal. It was held that the limitation imposed by the provisions similar to Clause (4) of Article 33 would be effective if the detention exceeded three months. In such a case the Advisory Board must be satisfied not only with regard to preventive detention but also in respect of the time-limit. Disagreeing with the majority views of the Indian Supreme Court which were based more on administrative expediency than the proper construction of the corresponding provisions of Article 22 of the Indian Constitution, Yakub Ali J said:

“A case of preventive detention is required to be referred to the Board only if the Government expresses an intention to detain a person for a period exceeding three months and not otherwise. The Board is cognisant of the fact that if it concurs with the order, the person concerned may be detained for an indefinite period. What appeals to the mind of the Board in forming its opinion is, therefore, not only the justification of preventive detention but a possible lifelong incarceration. How can it then be said that the mind of the Board must remain indifferent to the time factor and it is for the detaining authority alone to determine it after the Board has expressed its satisfaction.”³⁰

²⁹ *Abdul Aziz v. Province of West Pakistan*, PLD 1958 SC 499. If, after receiving the report of the Board, the Government wants to detain a person beyond six months, it has merely to confirm the order of detention, and this would result in an automatic continuation of his detention. *Dattaraya v. State of Bombay*, AIR 1952 SC 181; *Ujjal Mondal v. State of West Bengal*, AIR 1972 SC 1446.

³⁰ *Rahmat Elahi v. Govt. of West Pakistan*, PLD 1965 Lah 112 at p. 120.

If the order of detention is only for two months there is no scope for the Advisory Board to determine the "sufficiency of cause for his detention" and so the argument that a detainee is not entitled to pray for a writ of habeas corpus unless his case is referred to the Advisory Board is not tenable.³¹ Clause (4) of Article 33 contemplates detention for a specific period. Thus, an order of detention which did not specify any period, but merely stated "till further orders was held defective."³²

Subjective Satisfaction of the Detaining Authority

When a person who has been preventively detained moves a Court to restore his liberty, if he is detained under a statute providing for preventive detention, the Court is not concerned with the reasonableness or unreasonableness of the legislation.³³ The court's powers in determining the validity of an order of preventive detention purported to be passed under an Act of the legislature are, no doubt, undisputed and it will, accordingly, determine it.

But where the legislature has made the subjective satisfaction of the detaining authority the only requisite for making an order of detention the question has been raised whether the court can investigate the sufficiency or reasonableness of such satisfaction.

Though in earlier decisions the Courts in this sub-continent took the same view of "satisfaction" as expressed in *Halliday's* and *Liversidge's* cases, a completely different approach to this question is discernible in the case of *Ghulam Jilani v. Govt. of West Pakistan*.³⁴ Prior to *Jilani's* case the position was that it was the sole domain of the executive. It appears that even after *Jilani's* case satisfaction on the point still continues to be the sole domain of the executive. The only difference made is

³¹ *Maulvi Farid Ahmad v. Government of West Pakistan*, PLD 1965 Lah 135. Whether the period of detention is for more or less than six months, the Government is under a constitutional obligation to consider the representation of the person detained before such a reference is made, *J. N. Roy v. State of West Bengal*, AIR, 1972 SC 2143.

³² *Govt. of East Pakistan v. Rowshan Bijaya*, PLD 1966 SC 286.

³³ *Gopalan v. State of Madras*, AIR 1950 SC 27.

³⁴ PLD 1967 SC 373.

that "the subjective satisfaction of the executive has been made the subject-matter of scrutiny and examination by the Court which does not amount to enabling the Court to substitute its own mind for that of the executive. The Court will only see whether on the allegations the satisfaction of the executive authority could be held to have been well-founded."³⁵

In *Liversidge's* case under Regulation 18B of the Defence (General) Regulations, 1939, the Home Secretary was empowered to make an order for the detention of any person if he "has reasonable cause to believe" certain things about him. It might mean that the Secretary of State must have such cause of belief regarding the relevant facts as a court of law would hold sufficient to induce belief in the mind of any ordinary reasonable man. Or it might mean that he must have such cause of belief as he himself deems to be reasonable. In Lord Macmillan's opinion the requirement that a cause of belief shall be reasonable implied a reference to some standard of reasonableness. In answering the question whether the standard of reasonableness which must be satisfied was an impersonal standard, independent of the Secretary of State's own mind, or whether it was the personal standard of what the Secretary of State himself deemed reasonable, his lordship stated:

"Between these two readings there is a fundamental difference in legal effect. In the former case the reasonableness of the cause which Secretary of State had for his belief may, if challenged, be examined by a court of law in order to determine whether he had such cause of belief as would satisfy the ordinary reasonable man, and to enable the court to adjudicate on this question there must be disclosed to it the facts and circumstances which the Secretary of State had before him in arriving at his belief. In the latter case it is for the Secretary of State alone to decide in the forum of his own conscience whether he has a reasonable cause of belief, and he cannot, if he has acted in good faith, be called on to disclose to anyone the facts and circumstances which have induced his belief or to satisfy anyone but himself that these facts and circumstances constituted reasonable cause of belief."³⁶

³⁵ *Rezaul Malik v. Government of East Pakistan*, (1967) 19 DLR (Dac) 829.

³⁶ *Liversidge v. Anderson*, (1942) AC at 248. As will appear from cases decided later on, the principle laid down in this decision has not been followed in interpreting similar expressions. Thus, in *Nakkuda Ali v. Jayaratne*, (1951) AC 66 it was observed by Lord Radcliffe that the

Viscount Maugham in the same case gave four reasons why the action of the Secretary of State should not be subject to the discussion, criticism and control of a judge in a court of law.

First, it is a matter for executive discretion, so the court cannot interfere to determine either the reasonableness of the belief or whether it is necessary to exercise control over the person in question.

Secondly, since the Home Secretary is not acting judicially in such a case inasmuch as he can act on hear-say and is not required to obtain any legal evidence and clearly is not required to summon the person whom he proposes to detain and to hear his objections to the proposed order, it would be strange if his decision could be questioned in a court of law.

Thirdly, it is obvious that in many cases he will be acting on information of the most confidential character, which could not be communicated to the person detained or disclosed in court without the greatest risk of prejudicing the future efforts of the Secretary of State in this and like matters for the defence of the realm.

Fourthly, it is to be noted that the person who is primarily entrusted with these most important duties is one of the principal Secretaries of State, and a member of government answerable to Parliament for a proper discharge of his duties.

Lord Atkin, dissenting from the majority view, proceeded to show that the plain and natural meaning of the words 'has reasonable cause' 'imports the existence of a fact or state of facts and not the mere belief by the person challenged that the fact or state of facts existed' and this meaning had been accepted in legal decisions that 'reasonable cause' for a belief when it is

decision in *Liversidge v. Anderson* did not lay down any general rule as to the construction of such expression when it appears in statutory enactments. In *Ross-Clunis v. Papadopoulos*, (1958) 1 WLR 546 Lord Morton of Henryton said that when under the statute the Commissioner was entitled to impose a communal fine if he had satisfied himself of certain circumstances, if no grounds could be shown to have existed for such satisfaction "a court might infer either that he did not honestly form that view or that in forming it he could not have applied his mind to the relevant facts."

subject of legal dispute had been always treated as an objective fact to be proved by one or other party and to be determined by the appropriate tribunal. He observed:

"Reasonable cause for an action or a belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right. If its meaning is the subject of dispute as to legal rights, then ordinarily the reasonableness of the cause, and even the existence of any cause is in our law to be determined by the judge and not by the tribunal of the fact if the functions deciding law and fact are decided."

In his opinion the expression 'has reasonable cause to believe' implied an objective power of a justiciable nature. He approved the dictum of Pollock C.B. in *Bowditch v. Balchin*: "In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute." Words must be given their natural meaning. What he said immediately after has become famous:

"In this country, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

Can the duty to be 'satisfied' be delegated along with the power to detain? This question arose when, in making the detention order, the Provincial Commissioner said that it was necessary to exercise control over the appellant and not the Governor.³⁷ In *Liversidge's* case the powers of the Secretary of State under Regulation 18B were personal and could not be delegated. As Lord Wright had observed in that case: "The regulation places on the Secretary a public duty and trust of the gravest national importance. As I understand the regulation, it is a duty which he must discharge on his own responsibility to the utmost of his ability, weighing on the one hand, the suspect's right to personal liberty, and, on the other hand,

³⁷ *Edward Liso Mungoni v. Attorney-General of Northern Rhodesia*, (1960) AC 336.

the safety of the State in the dire national peril in which during this war it has stood and stands.' But in Northern Rhodesia the Emergency Powers Regulations, 1956 contained an express provision (Regulation 47) enabling the Governor to delegate his powers. It was argued that the authority of the Governor to delegate applied only to 'powers' and not to 'duties'. Regulation 16(1) contained a duty and also a power. The 'duty' laid upon the Governor was to be 'satisfied' that it was necessary to exercise control over any person. The 'power' was to make an order directing that such person be detained. It was contended that the effect of Regulation 47 was to authorise the Governor to delegate his 'power' to make an order, but it did not authorise him to delegate his 'duty' to be satisfied. He was bound to fulfil this duty himself personally. Lord Denning, in delivering the judgment of the Judicial Committee, said:

"The power and the duty under Regulation 16 (1) are so interwoven that it is not possible to split the one from the other—so as to put the duty on one person and the power in another. Whoever exercises the power, he it must be who has to carry out the duty. If the Governor has any authority at all to delegate his functions under Regulation 16 (1), he must be able to delegate both the power and the duty together to one and the same person. He cannot delegate the power to another and keep the duty to himself."

Rejecting the argument that if the power cannot be split from the duty, then it means that the Governor cannot delegate his functions under Regulation 16 (1) at all, for he cannot delegate his duty under it to anyone, he further said:

"Regulation 16 (1) contains not so much a duty, but rather a power coupled with a duty. The power of the Governor to make a detention order can only be exercised when he is 'satisfied' that it is necessary. The requirement that he is to be satisfied—though in one sense a duty—is nevertheless also a condition or limitation on the exercise of the power. And when Regulation 47 authorises the Governor to delegate the power to any person, it authorises him to delegate to such person the fulfilment of all the conditions and limitations attaching to it, even though they be also duties."

As already observed, the Courts in the Indian sub-continent adopted the view of the majority in *Liversidge's* case, in reference to preventive detention legislation in those countries, and

declined to go into the question whether, on the matters relied by the Executive Authority to detain, a reasonable man would have reached the same conclusion.

The Federal Court of India considered a case which was concerned with Rule 26 made under Defence of India Act, 1939.³⁸ It held that the Court would not investigate the sufficiency of materials or the reasonableness of the grounds upon which the Governor had been satisfied. However, in answering which is the authority that must be satisfied before an order under Rule 26 can be made, the Court observed :

“... whenever powers of this kind or indeed other special statutory powers are conferred, they must to the extent to which specific provision has been made in the statute conferring the powers be exercised by the authority and in the manner specified in the statute and in strict conformity with the provisions thereof.”

In an appeal from a judgment of the Nagpur High Court the Judicial Committee of the Privy Council observed that although under Rule 129 made under the Defence of India Act, 1939, any police officer could arrest on mere suspicion, the suspicion must be a reasonable one and that was a justiciable issue. The burden is on the police officer to satisfy the Court before which the arrest is challenged that he had reasonable grounds of suspicion, while under Rule 26 an order of detention could be made by the concerned authority if satisfied that it was necessary with a view to preventing a person from indulging in subversive activities specified. Rule 26 only demands that the authority must be satisfied—there was no qualifying adverb such as “reasonably” or “honestly” attached. Mere suspicion was not enough. If the word “satisfied” was used without any

³⁸ *Emperor v. Sibnath Banerjee*, AIR 1943 FC 75.

Rule 26 (1). “The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to...it is necessary so to do, may make an order: (b) directing that he be detained;”

Rule 129 (1). “Any police officer . . . may arrest without warrant any person whom he reasonably suspects of having acted (a)...in a manner prejudicial to the public safety or to the efficient prosecution of the war.”

qualifying adverb such as "reasonably", the word "satisfied" must receive a subjective interpretation and the discretion of the authorities making the detention order could not be questioned in a court of law.³⁹

It is submitted that the presence or absence of the adverbs "reasonably" and "honestly" in this context are of little importance, for the legislature assumes that powers of this kind will be reasonably and honestly used. The question is whether the legislature intended the exercise of such powers to be subject to judicial control.

A full bench of the Bombay High Court held that it was not within the competency of the court to investigate whether there were grounds upon which the detaining authority could be "satisfied" before making an order of detention.⁴⁰ In a case under the Madras Public Order Act I of 1947 it was held that "satisfaction" implied a subjective state of mind and could be known from what was recited in the order.⁴¹

In the leading case on the Indian Preventive Detention Act of 1950 it was held that the subjective satisfaction of the authority detaining a person was sufficient for justifying the order of detention. Kania CJ of the Indian Supreme Court observed:

"It is clear that no such objective standard of conduct can be prescribed. He quoted Lord Finlay in *Halliday's* case as saying that a court was the least appropriate tribunal to investigate the question whether circumstances of suspicion existed warranting the restraint of a person."⁴²

In *Bombay v. Atma Ram*⁴³ Section 3 of the Preventive Detention Act of 1950 came for consideration of the Indian Supreme Court. The section laid down that before the government could pass an order of preventive detention it must be satisfied with respect to the individual person that his activities were directed against one or the other of the three objects

³⁹ *Emperor v. Vimlabai Deshpande*, AIR 1946 PC 123.

⁴⁰ *In re Jayantilal*, AIR 1949 Bom 319.

⁴¹ *In re Venkatarman*, AIR 1949 Mad 529.

⁴² *Gopalan v. State of Madras*, AIR 1950 SC 27 at p. 43.

⁴³ AIR 1951 SC 157.

mentioned in the section and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. The wording of the section clearly showed that it was the satisfaction of the Central or State government on the point which alone was necessary to be established. On the question whether the information upon which the detaining authority acted was sufficient, the Supreme Court observed that a court of law could not adjudicate on questions like this as it was a matter for the subjective satisfaction of the authority.

However, the basis of the satisfaction of the authority passing an order of detention must be such that any reasonable person would be satisfied that the person detained should act in a manner prejudicial to the public safety or other matters included in the statute. Thus, it was held that the State of Bombay could not pass an order for preventive detention of a person found within its territory, on account of his activities in the State of Madras, nor could it direct such a person to be detained in the State of Madras.⁴⁴

In the cases cited below the courts in Pakistan accepted the principle that "satisfaction" of the detaining authority could not be questioned before a court of law.

In *Mohammad Ali v. The Crown*⁴⁵ the detenué originally was detained under the provisions of the West Punjab Public Safety Act II of 1947 and later his detention was extended under the 1948 Ordinance and Act XVIII of 1949. Relying on *Liversidge's* case, the Pakistan Federal Court observed that the Act only demanded the satisfaction of the detaining authority which was not a matter on which the court could substitute its own judgment for that of the detaining authority. The implication of the word "satisfied" used in the Punjab Public Safety Act XVIII of 1949 was considered in another case by the Federal Court of Pakistan and relying on the dissenting opinion of Lord Atkin in *Liversidge's* case and *Vimlabai Deshpande's* case it held that had the adverb "reasonably" preceded the word "satisfied", the court would

⁴⁴ *In re S. Kumarmangalam*, AIR 1951 Mad 383.

⁴⁵ PLD 1950 FC 1.

have examined the adequacy of reasons for the satisfaction of the police officer but as was not the case, the Act did not give any scope for the court to exercise jurisdiction.⁴⁶

Where the petitioners were detained under Section 3 of the N. W. F. P. Public Safety Act of 1948, merely because they were believed capable of staging a demonstration on the occasion of the Chinese Prime Minister's visit, the grounds furnished were "the fomenting of agrarian trouble between landlords and tenants and inciting the tenants in a manner likely to endanger peace and tranquillity." The Court observed that there was no rational basis for the satisfaction of the government which passed the order of detention.⁴⁷ In one of the earlier cases under the provisions of the Frontier Province Act II of 1948 as amended by Ordinance III of 1949, the order of detention was made to prevent the detainee from endangering public safety in the Frontier Province. The Court held that the conduct of the detainee was prejudicial to the maintenance of public order and declined to decide on the question of "satisfaction" on the part of the detaining authority.⁴⁸ In a case under Baluchistan Public Safety Regulation I of 1949, the Court held that the question whether the grounds were sufficient was not within its jurisdiction and declined to interfere with the satisfaction of the detaining authority.⁴⁹ Even if the order of detention is made on a typed or cyclostyled paper, unless it is proved that the detaining authority did not consider each case on its merits, the order will not be invalidated.⁵⁰ Where an order, though made on a printed form, was authenticated by the signature of the Chief Secretary, it could not be held that there was no satisfaction before the order was passed nor that it was made *mala fide*.⁵¹

A case which arose on the order of arrest and detention of an influential Member of the National Assembly of Pakistan under

⁴⁶ *Md. Hyat v. Crown*, PLD 1951 FC 15.

⁴⁷ *Khan Ghulam Muhd. Khan v. The State*, PLD 1957 Lah 497.

⁴⁸ *Shad Md. v. Crown*, PLD 1950 Pesh 22.

⁴⁹ *Fazal Ahmed v. Crown*, PLD 1950 Baluch 35.

⁵⁰ *Emperor v. Sibnath Banerjee*, AIR 1943 FC 75.

⁵¹ *Shah Md. v. Crown*, PLD 1950 Pesh 22 at p. 33.

Section 3 of the West Pakistan Public Maintenance Order (Ordinance No. XXXI of 1960) considered whether such detention was illegal because the Governor did not appear to have satisfied himself whether the grounds were sufficient. In stating the well-settled principle that the question "whether the detaining authority was satisfied on sufficient or insufficient grounds in issuing the order of detention is not justiciable," Sarder Muhammad Iqbal J of the West Pakistan High Court, opined that

"although the Court cannot question the sufficiency or otherwise of the cause which is the basis of the satisfaction of the competent authority, yet the Court is well within the exercise of its judicial authority to satisfy itself that on the grounds which are the basis of the detention, the detaining authority could not be satisfied as to the correctness of the order passed by it. If the grounds are not relevant to the object which the legislation has in view, namely, maintenance of the public order etc., there could be no basis for the satisfaction of the competent authority and the Court in that case can hold that the condition precedent for the passing of the order is non-existent."⁵²

The trend of these decisions in empowering the detaining authority to exercise absolute discretion and to be the judge of its satisfaction was reversed in the case of *Ghulam Jilani v. Government of West Pakistan*⁵³ where the validity of the detention order under Rule 32 of the Defence of Pakistan Rules, 1965 was challenged.⁵⁴ Rule 32 was framed under clause (x) of Section 3 (2) of the Defence of Pakistan Ordinance, 1965. Rule 204 which conferred wide discretionary power on any police officer

⁵² *Maulvi Farid Ahmad v. Government of West Pakistan*, PLD 1965 Lah 135 at p. 142.

⁵³ PLD 1967 SC 373. Views contrary to this decision still dominate the Courts in India, *Pushkar Mukherjee v. The State of W.B.*, AIR 1970 SC 852.

⁵⁴ Rule 32 is as follows:

- (1) The Central Government, if satisfied with respect to any particular person, that with a view to preventing him from acting in a manner prejudicial to the security, the public safety or interest or the defence of Pakistan the maintenance of public order, Pakistan's relations with the other power, the maintenance of peaceful conditions in any part of Pakistan, the maintenance of essential supplies and services or the efficient conduct of military operations or prosecution of war, it is necessary, so to do, make an order
- (b) directing that he be detained."

or any other officer empowered by the Government to arrest without warrant any person whom he reasonably suspects of having acted or acting or of being about to act which resembles Rule 32 was also considered in this connection. In this case the Supreme Court of Pakistan considered the question as to how far the plea of subjective satisfaction of the detaining authority will relieve it from placing materials before the Court to show that it has acted reasonably. Reference was made to two cases decided by the Judicial Committee of the Privy Council.

In interpreting the word "satisfied" used in Rule 32 the expressions "suspects on grounds appearing to such authority to be reasonable" which occur in clause (x) of Section 3 (2) of the Defence of Pakistan Ordinance, 1965 was referred to, because Rule 32 is derived from Section 3 of the Ordinance. The conviction that the authority, while acting under Rule 32, should satisfy the Court that it has acted on reasonable grounds was strengthened by the constitutional requirement that every citizen must be treated in accordance with law and the constitutional provisions relating to judicial review of executive action.

If reasonable grounds must be established to give protection to a Police officer acting on mere suspicion as was held in *Sibnath Banerjee's* case, a mere declaration of satisfaction cannot be deemed to afford protection to an authority who acts on satisfaction.

The question whether it is admissible to differentiate between protection for action on suspicion, and action on satisfaction, so that in one case reasonable grounds must be established to give protection and in the other a mere declaration is sufficient, was answered in the negative for the reason that Rule 32 "requires a stronger ground for action than mere suspicion, however, reasonable". Further, Cornelius CJ who delivered the judgment, was of the view that clause (x) did not 'differentiate between the authorities which may be empowered to act, with the incident of protection, on suspicion and those which may act, under similar protection, on satisfaction'. Though the element of status of the authority who is to order the detention was present in Rules 32 and 204, it did not appear from the words used in

clause (x). However, since the clause provided for restraint upon personal liberty guaranteed to the citizen, the Court felt that "to gain the protection of the rule for its action thereunder, the authority should be prepared to satisfy the Courts, to which the subject is entitled to have resort for determination of the question whether he has been treated in accordance with law, that it has acted on reasonable grounds."

The Court expressed its inability to accept the construction which was put upon the corresponding provisions in the Defence of India Act and Rules thereunder in the cases of *Sibnath Banerjee* and *Vimlabai Deshpande*, and by referring to the political background against which the powers under that Act were exercised, reached the conclusion that insofar as the exercise of powers under that Act was controlled by no less a person than the Secretary of State for India, there was no scope for the intervention of the Court to control the exercise of such power. Similarly, in the case of *Liversidge v. Anderson* the element of status of the authority who ordered the detention and the existence of emergency determined the attitude of the Court. Having regard to the constitutional provisions in Article 98 which empowered the Court to determine whether the executive authorities have acted with lawful authority and Article 2 which guaranteed that the citizens must be treated in accordance with law, which provisions would be rendered meaningless if any other interpretation is given to the words used in Rule 32 whereby the authority may be enabled to become the judge of its own satisfaction for imposing restraint on the citizen's liberty, the Court felt that it had no other alternative to discarding the principle laid down in *Sibnath Banerjee's* case and *Liversidge v. Anderson*. In the words of Cornelius CJ,

"Satisfaction' of the detaining authority acting under rule 32 must be a state of mind, which has been induced by the existence of reasonable grounds for such satisfaction. The power of an authority acting under rule 32 is therefore, no more immune to judicial review than is the power of a police officer acting under rule 204... Suspicion would include belief or knowledge, whether inferential or actual. On the same reasoning, it must follow that actions by

other and perhaps higher authorities, under rule 32, like all other actions relatable to the power delineated in clause aforesaid, are equally susceptible of judicial review.”⁵⁵

In *Abdul Baqi Baluch v. Govt. of Pakistan*⁵⁶ the Supreme Court reaffirmed the principle it laid down in *Ghulam Jilani's* case that by the mere production of the order the executive was not relieved of its duty to convince the Court that the person detained was not being held without lawful authority or in an unlawful manner. The Court which is required by the Constitution, whenever a person detained in custody is brought before it, to “satisfy itself that he is not being held in custody without lawful authority” or in an unlawful manner”, cannot be expected to be satisfied on the mere *ipse dixit* of the detaining authority. It was observed, quite rightly, that this principle was neither so new nor so radical and was being followed even in England until the case of *Liversidge v. Anderson* ‘gave the doctrine of the subjective test a new dimension’. A case which was decided in 1941 was rather consciously advocating a middle course which, in the opinion of Lord Wright, is that “while, on the one hand, the order is not a sufficient return, some statement, I suppose, on oath, of the evidence on which it is based and on which the respondent acted, is necessary, so that if the respondent is debarred by the exigencies of official secrecy from disclosing all his reasons, he must at least disclose sufficient materials to satisfy the Court that he had reasonable cause to believe.”⁵⁷ The decision in *Liversidge's* case must, therefore, be regarded ‘as limited to the interpretation of Regulation 18B....as special war measure in which the authority to take action had been vested in the highest executive authority in the country, namely, the Home Secretary, who was answerable to the House for his actions’. Hamoodur Rahman J who delivered the judgment observed that it was not the duty of the Court reviewing executive actions to sit on appeal over the executive or to substitute its own discretion for that of the

⁵⁵ *Ghulam Jilani v. Govt. of West Pakistan*, PLD 1967 SC 373; *Nurur Rahman v. Hatem Ali Khan*, (1968) 20 DLR (Dac) 1087.

⁵⁶ PLD 1968 SC 313.

⁵⁷ *Greene v. Secy. of State*, (1941) All E. R. 388.

latter but to examine whether the executive authority had sufficient materials before it upon which a reasonable person could have come to the same conclusion. He said:

"It is not uncommon that even high executive authorities act upon the basis of information supplied to them by their subordinates. In the circumstances it cannot be said that it would be unreasonable for the Court, in the proper exercise of its constitutional duty, to insist upon a disclosure of the materials upon which the authority had so acted so that it should satisfy itself that the authority had not acted in an unlawful manner."

Further, if any privilege is claimed for any document containing such materials, it is for the Court to decide whether it is really so privileged.

It requires mentioning that Article 102 of the Constitution of Bangladesh which has conferred the power of judicial review upon the Supreme Court is similar to Article 98 of the Constitution of Pakistan, 1962 and whatever observations were made by the Supreme Court of Pakistan in the two cases just considered by us and in another case,⁵⁸ which we shall presently consider, will be equally applicable in determining the scope of Article 102.

The same question whether the Court can examine the grounds upon which the detaining authority has formed the opinion and by judging them by the standard of a reasonable person say whether they are reasonable or not came up for consideration in this case. Neither the usurpation of the functions of the detaining authority, nor the substitution of the Court's decision for that of the authority is permissible, as was already pointed out in the case of *Abdul Baqi Baluch*, but the Court can always look into the grounds to see whether they relate to the purposes of the statute upon which the action of the authority has been founded and there has been an honest application of the mind before the order was made. It was observed that even if the statute does not require the authority to act upon reasonable grounds and leaves it to act upon its subjective satisfaction, the

⁵⁸ *Govt. of West Pakistan v. Begum Agha Karim Shorish Kashmiri*, PLD 1969 SC 14. A number of Indian and Pakistani cases on the reasonableness of satisfaction and its amenability to judicial scrutiny were recently considered in *Mrs Aruna Sen v. Govt. of Bangladesh*, (1975) 27 DLR 122.

Court would not be debarred from examining the question of reasonableness, for, otherwise it would be beyond the pale of judicial power to "determine as to whether the officer concerned really believed that facts existed which would bring the case within the statute and honestly intended to put the law into force". The Court has always the power to see that the action is not malafide, a mere colourable exercise of power or a fraud upon the statute. The action will be malafide if the satisfaction upon which it is based is unreasonable.⁵⁹

In this case, the Court took a contrary view from that expressed in *Liversidge's* case and in the Indian and Pakistan decisions generally as to whether an onus is thrown on the detaining authority to prove that he had reasonable cause to believe or been satisfied before making an order of detention. In *Liversidge's* case Viscount Maugham observed:

"The order on its face purports to be made under the regulation and it states that the Secretary of State had reasonable cause to believe the facts in question. In my opinion, the well-known presumption *omnia esse rite acta* applies to this order and, accordingly, assuming

⁵⁹ *Tafur Uddin v. The State*, (1975) 27 DLR 18; *Mrs Aruna Sen v. Govt. of Bangladesh*, (1975) 27 DLR 122.

An order of detention is malafide if it is based on improper or irrelevant grounds, *Gopalan v. State of Madras* AIR 1950 SC 27; or is made for a purpose not mentioned in the detention order, *Naranjan Singh v. State of Punjab* AIR 1952 SC 106; aims to facilitate a secret investigation into crime, *Vimlabai v. Emperor*, ILR 1945 Nag 6; or where the detaining authority has not applied its mind, *D'Souza v. State of Bombay*, 1956 SCR 382; or where the prisoner is awaiting his trial under ordinary law, *Ishaq v. State*, AIR 1957 All 782; or is made to extend the period of imprisonment already served out by the prisoner. In *re Srinivasan*, AIR 1949 Mad 761; *Mani v. District Magistrate* AIR 1950 Mad 162; the burden to prove malafides is on the person detained, *Basanta v. Emperor*, AIR 1945 FC 18. "It is not sufficient merely to allege that the detention is not in good faith....Facts have got to be alleged by the detainee sufficiently to persuade the Court that although the order *ex facie* indicates that everything that should have been done has been properly done, it is entitled or it is proper for the Court to call upon the Executive further to justify what is expressed to have been done in the order, *Emperor v. Sibnath*, AIR 1944 FC 1; if same grounds are mentioned in an order of detention passed subsequently, no mala fides are established from this fact, *Ujagar Singh v. State of Punjab*, AIR 1952 SC 350.

the order to be proved or admitted, it must be taken *prima facie*, that is until the contrary is proved, to have been properly made and that the belief of the Secretary of State was complied with."⁶⁰

Without reviewing all the cases in India and Pakistan applying the principle of *omnia praesumuntur esse rita acta*, it may be stated that a presumption will be drawn in favour of official acts if the order is *ex facie* regular and in conformity with the provisions of the detention law, but on the authority of two English cases,⁶¹ Zafrulla Khan J, as he then was, observed that they left "no room for doubt that the presumption attaching to an order regular on the face of it is only a rebuttable presumption."⁶²

The reasonableness of suspicion which led to the arrest of a person and his subsequent detention was a justiciable question and, therefore, the arresting officer must satisfy the Court that he entertained his suspicion against that person on reasonable grounds. The attempt by the Government to uphold the validity of an arrest under Section 41 of the East Pakistan Public Safety Ordinance, 1958 which authorised a police officer not below the rank of a Sub-Inspector to "arrest without warrant any person whom he reasonably suspects of having done, or of doing, or of being about to do, a prejudicial act" was unsuccessful, because, in the opinion of the Court, the burden lay upon the arresting officer to show that his suspicion was reasonable, which he had failed to discharge. In distinguishing the circumstances of the present case from those in *Liversidge v. Anderson*, S.A. Rahman J observed:

"The words that fell to be construed in *Liversidge v. Anderson* were "reasonably satisfied" and they were held to signify only the personal satisfaction of the Home Secretary. It may be added that the construction in question was adopted in connection with a war-time measure. We are here dealing with peacetime legislation and though questions of security of the State or public order may involve at times, considerations of a confidential character and of the greatest urgency, yet it would be difficult to uphold a construction which

⁶⁰ (1942) AC 206 at p. 224.

⁶¹ *Greene v. Secretary of State for Home Affairs*, (1942) AC 284; *Liversidge v. Anderson*, (1942) AC 206.

⁶² *Emperor v. Sibnath Banerjee*, AIR 1943 FC 75 at p. 85.

jeopardizes the precious right of personal liberty of a citizen, during peace time, on the mere *ipse dixit* of a Police Officer.”⁶³

As no reason for the arrest “beyond merely reiterating that the arrest was justified under law” was given the arrest was held illegal.

Communication of Grounds

Clause (5) gives the detained person right to know immediately “the grounds on which the order has been made.” The reason for the expression “as soon as may be” for furnishing grounds and “the earliest opportunity” for making a representation indicates the extreme anxiety of the makers of the Constitution to see that no person is detained contrary to the law enabling preventive detention or contrary to the safeguards provided by the Constitution.⁶⁴ In declaring that Section 41 of the East Pakistan Public Safety Ordinance, 1958 which did not provide for any such communication of grounds violated the Constitutional guarantee similar to those contained in Clause (5) of Article 33, A. S. Choudhury J of the Dacca High Court, said:

“It is a clear mandate of the Constitution.....that when a person is detained in pursuance of an order under “any law” providing for preventive detention, the authority shall, as soon as may be, communicate the grounds....The other requirement of the Constitution is that the person so detained, shall be afforded the earliest opportunity of making a representation. Making a representation clearly requires that he should be provided with grounds with sufficient clarity in order to enable him to make an effective representation against his detention.”⁶⁵

The grounds which satisfied the detaining authority to make the order must exist before the order is made. The grounds which are conclusions from facts, not a recital of facts, must be supplied to the detained person in full.⁶⁶ Communication

⁶³ *Govt. of East Pakistan v. Rowshan Bijaya*, PLD 1966 SC 286; *Md. Habibur Rahman v. Govt. of Bangladesh*, (1974) 26 DLR 201.

⁶⁴ *Pankaj Kumar v. State of West Bengal*, AIR 1970 SC 97. See Section 8 of the Special Powers Act, 1974.

⁶⁵ *Rowshan Bijaya v. Govt. of East Pakistan*, PLD 1965 Dac 241.

⁶⁶ *State of Bombay v. Atmaram*, AIR 1951 SC 157; *Naresh Chandra v. State of West Bengal*, AIR 1959 SC 1335.

means bringing home to the detainee effective knowledge of the facts on which the order of detention is based.⁶⁷ Facts may be supplied after the communication of the grounds. Facts need not be exhaustive. No part of such grounds can be held back nor can any more grounds be added thereto. What must be supplied are the "grounds on which the order has been made and nothing less. There is, however, no bar to the communication of particulars or facts in relation to the grounds already furnished." In *Khan Ghulam Muhd. Khan v. The State*,⁶⁸ it was held that the words "as soon as may be" had the same meaning in Clause (5) as they had in Clause(1) of Article 7 of the late Constitution of Pakistan or at least as near them as may be. The grounds on which the detaining authority made the order must be known to it on the day when the order is made and should be served along with the order of detention. As the grounds of detention were not set out in detail and not communicated to the detained person until sixteen days had passed after the order of detention, the delay clearly violated the constitutional safeguard. The Court observed that "the delay resulting from ordinary dilatoriness in various offices cannot be allowed to invade a fundamental right." Moreover, the grounds on which action had been taken were not the grounds communicated to the detainee who could not, therefore, make a representation against the order. Also, as the subsequent order passed by the Government was found to be a continuation of the order of detention passed by the District Magistrate who omitted to communicate the grounds, the subsequent order itself was illegal.

There is a substantial distinction between a fresh order of detention and one extending a previous illegal order of detention. Where the subsequent order of detention merely extends the previous detention which had been found to be illegal, the subsequent order must be held to be vitiated.⁶⁹

After the Constitution of Pakistan, 1956 came into force sub-section 5-A(i), requiring the detaining authority to

⁶⁷ *Haribandhu v. District Magistrate*, AIR 1969 SC 43.

⁶⁸ PLD 1957 Lah 497.

⁶⁹ *Government of East Pakistan v. Rowshan Bijaya*, PLD 1966 SC 286.

communicate the grounds of detention to the detainee, was added to Section 2 of the Baluchistan Public Safety Regulation, 1947 to make the statute consistent with Article 7 (5) of the Constitution. The order of detention was dated November 4, 1955. The grounds of detention were not communicated to the detainee till about two months after the Constitution was enforced. It was held that "as soon as may be" did not mean an indefinite period and the delay of two months in communicating the grounds led to the inference that it was not in keeping with the above words as provided either under Clause (5) of Article 7 or sub-section 5-A (i) of the above Act. The question whether grounds were supplied "as soon as may be" is one of fact which would depend on the particular facts and circumstances of each case.⁷⁰

In *Siraj-ud-din v. The State*⁷¹ the petitioners were detained under the Security of Pakistan Act, 1952. Although as a matter of practice the Central Government had reviewed the orders of detention, the results of such review were not communicated to the detainee as required by the provisions of the aforesaid Act. It was held that the failure of the Central Government to comply with the statutory obligation in respect of the detention orders made the further detention of the petitioners illegal. The provisions of a statute which imposed restriction on the personal liberty of a subject must be strictly and rigorously complied with before an order of detention without trial in a regular court of law could be upheld by the courts.

Where no grounds were specified as to why the suspicion had been entertained by the Police Inspector, the arrest was bad from the very inception.⁷² Whether the suspicion was reasonable or not, is a justiciable question.⁷³ It was the duty of the officer who arrested the person to justify his action by disclosing reasonable grounds which will satisfy the judicial conscience.⁷⁴

⁷⁰ *Fazal Ahmad Ghazi v. The State*, PLD 1957 Kar 190.

⁷¹ PLD 1957 Lah 962; *Rahmat Elahi v. Government of West Pakistan*, PLD 1965 Lah 112.

⁷² *Govt. of East Pakistan v. Rowshan Bihaya*, PLD 1966 SC 286.

⁷³ *Ibid.*

⁷⁴ *Ibid.*; *Tafur Uddin v. The State*, (1975) 27 DLR 18.

If the words of the section of the statute providing for preventive detention are reproduced without disclosing the grounds for which action was taken, Clause (5) of Article 33 is not properly complied with.⁷⁵ The detained person must have sufficient details which may make it possible for him to make a proper representation to the authority.

"It is up to the detaining authority to make his meaning clear beyond doubt, without leaving the person detained to his own resource for interpreting the grounds."⁷⁶

Communication means "imparting to the detenu sufficient knowledge of all the grounds on which the order of detention is based. In this case the grounds are several and are based on numerous speeches said to have been made by the appellant himself on different occasions and different dates. Naturally, therefore, any oral translation or explanation given by the police officer serving those on the detenu would not amount to communicating the grounds. Communication, in this context, must mean bringing home to the detenu effective knowledge of the facts and circumstances on which the order of detention is based."⁷⁷ Where the ground supplied to the person detained along with the order under Section 17 of the East Pakistan Public Safety Ordinance, 1958 was vague and indefinite, it was held that it did not give him any opportunity to make an effective representation.

"Requirement of the Constitution is not merely a provision for submission of a representation. It must enable the detenu to make an effective representation on the basis of which the authority concerned may make an order of release and the grounds must be furnished in such a manner that a layman can understand what are the grounds on which he is being detained.....Insistence on making provision for serving grounds is not for mere ceremony but really

⁷⁵ *State of Bombay v. Atmaram*, AIR 1951 SC 157; *Pushkar Mukherji v. State of West Bengal*, AIR 1970 SC 852.

⁷⁶ *Ram Krishna v. State of Delhi*, AIR 1953 SC 318.

⁷⁷ *Harikisan v. State of Maharashtra*, AIR 1962 SC 911 at pp. 913-914; *Haribandhu v. D.M.*, AIR 1969 SC 43.

in the interest of Justice so that the person deprived of his liberty may have adequate information about the allegations against him and give explanations for securing his release.”⁷⁸

Nature of Grounds and Right of Representation

Grounds must not be vague. Kania CJ of the Indian Supreme Court considered “vague” as the antonym of “definite” He said:

“If the ground which is supplied is incapable of being understood, or defined with sufficient certainty it can be called vague.....It is, however, improper to contend that a ground is necessarily vague if the only answer of the detained person can be to deny it..... If on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention it cannot be called vague.”⁷⁹

Where the detainee did not know enough English to understand the grounds served upon him in order to be able effectively to make his representation against the order of detention, it was held that there was not sufficient compliance in this case with the requirements of Clause (5) of Article 22, corresponding to Clause (5) of Article 33 of the Constitution of Bangladesh.⁸⁰ Any oral translation or explanation given by the police officer serving the grounds would not, as already seen, amount to communicating the grounds.⁸¹ The constitutional right to make a representation to the detaining authority is infringed if the grounds supplied do not enable the detainee to make an early and effective representation against the order of detention. A communication which cannot be readily understood by a layman is vague.⁸² The question whether the vagueness or indefinite nature of the statement furnished to the detained person is such

⁷⁸ *Rowshan Bijaya v. Govt. of East Pakistan*, PLD 1965 Dac 241. Here, grounds communicated which alleged association with illegal activities of a secret organisation were held vague and indefinite.

⁷⁹ *State of Bombay v. Atmaram*, AIR 1951 SC 157; *Govt. of East Pakistan v. Rowshan Bihaya*, PLD 1966 SC 286.

⁸⁰ *Harikisan v. State of Maharashtra*, AIR 1962 SC 911.

⁸¹ *Ibid.*

⁸² *Ram Krishan v. State of Delhi*, AIR 1953 SC 318.

as to give him the earliest opportunity to make a representation to the authority is a matter within the jurisdiction of the court's enquiry and subject to the court's decision. The conferment of the right to make a representation necessarily carries with it the obligation on the part of the detaining authority to furnish the grounds, i.e. materials on which the detention order was made.⁸³

Four principles which must be followed with regard to the right of representation are, as enumerated by the Indian Supreme Court, as follows:

First, the authority is bound to give an opportunity to the detenu to make a representation and to consider the representation as early as possible.

Secondly, the consideration of the representation by the authority is entirely independent of any action by the Advisory Board including the consideration of the representation by the Advisory Board.

Thirdly, there should not be any delay in the matter of consideration. It is true, that no hard and fast rule can be laid down as to measure of time taken by the authority for consideration but it has to be remembered that the Government has to be vigilant in the governance of the citizens.

Fourthly, the Government is to exercise its opinion and judgment on the representation before sending the case along with the representation to the Advisory Board. If the Government will release the detenu the Government will not send the matter to the Advisory Board. If however, the Government will not release the detenu the Government will send the case along with the representation to the Advisory Board. If the Advisory Board expresses an opinion in favour of release the Government will release the detenu. But if it expresses an opinion against his release the Government may still exercise the power to release him.⁸⁴

⁸³ *State of Bombay v. Atmaram*, AIR 1951 SC 157. It is incumbent upon the Government to satisfy the Court that there were valid reasons for not considering the representation of the detained person expeditiously and that the detention is legal and in conformity with the requirements implicit in Article 33(5). *Niranjan Singh v. State of Madhya Pradesh*, AIR 1972 SC 2215.

⁸⁴ *Jayanarayan v. State of West Bengal*, AIR 1970 SC 675; *Niranjan Singh v. State of Madhya Pradesh*, AIR 1972 SC 2215.

The Court can always examine the relevancy of the grounds supplied to the object of the preventive detention law. The aggrieved person must have a right to put before the court the grounds for his detention, otherwise the court cannot consider whether the requirements of Clause (5) have been observed. If 'a person is served with a paper on which there are written three stanzas of a poem or three alphabets written in three different ways', he must be allowed to put this paper before the court.⁸⁵ If only one of the several grounds communicated to the detained person is irrelevant⁸⁶ or vague⁸⁷ the detention is invalid. Where one of the two grounds was found non-existent, the Supreme Court of India held that the detention order was invalid.

"We can neither decide whether these grounds are good or bad, nor can we attempt to assess in what manner and to what extent each of these grounds operated on the mind of the appropriate authority and contributed to the creation of the satisfaction on the basis of which the detention order was made. To say that the other ground, which still remains, is quite sufficient to sustain the order, would be substitute an objective judicial test for the subjective decision of the executive authority which is against the legislative policy underlying the statute."⁸⁸

Where the detained persons were alleged to have published and distributed pamphlets containing a scurrilous and vitriolic attack on the character and integrity of the Chief Justice of Pepsu, it was observed that the Supreme Court could examine the grounds disclosed by the government to see if they were relevant to the object which the legislation had in view, namely the prevention of objects prejudicial to the defence of India or security of State and maintenance of law and order. The publication or distribution of the pamphlets were in no way likely to prejudice the maintenance of law and order.⁸⁹

⁸⁵ *Gopalan v. State of Madras*, AIR 1950 SC 27.

⁸⁶ *Keshav Talpade v. Emperor*, AIR 1943 FC 1.

⁸⁷ *Ram Krishan v. State of Delhi*, AIR 1953 SC 318. In this case the Court adopted the standard of an average reasonable man to decide whether a ground was vague or not.

⁸⁸ *Shibban Lal v. State of Uttar Pradesh*, AIR 1954 SC 179.

⁸⁹ *Sodhi Shamser Singh v. State of Pepsu*, AIR 1954 SC 276.

In a case before the Bombay High Court⁹⁰ the order contained a recital that the person concerned was inciting a section of labourers of "Tata Air India" to sabotage. It was observed that there was no such company in existence; the Police Commissioner was actually referring to "The Air India Limited," but this misdescription was held to justify the court to declare the order illegal. The court is competent to investigate whether due care and caution had been exercised by the detaining authority before passing the order.

But vague grounds are not the same as irrelevant grounds. An irrelevant ground has no connection at all with the satisfaction of the detaining authority because it is one which has no logical bearing on the object of the detention expressed in the order of detention, or in the statute. A ground though relevant may be vague in that the detaining authority's expression of it may not be intelligible to a reasonable man, so that the detainee cannot make a representation; if grounds are vague, it is by no means clear that the detaining authority was satisfied as to the necessity of the detention order.⁹¹ Kania CJ, of the Supreme Court of India, observed:

"The sufficiency of the grounds to give the detained person the earliest opportunity to make a representation can be examined by the court but only from that point of view i.e. (relevance and vagueness). The quality and characteristic of the grounds need not be the same for both tests. One person may be but another person may not be satisfied on the same grounds. That aspect, however, is not for the determination of the court. The second part of the enquiry is clearly open to the court under Article 22(5)."⁹²

The grounds on which the detaining authority was satisfied must be such as a rational human being would consider connected in some manner with the objects which were to be prevented from being achieved.⁹³ 'Ground' means "that which can form a basis for an order and if it cannot form a true basis it

⁹⁰ *In re Shoilen De*, AIR 1949 Bom 75.

⁹¹ *Tarapada De v. State of West Bengal*, AIR 1951 SC 174.

⁹² *Ibid.*; *Rowshan Bijaya v. Govt. of East Pakistan*, PLD 1965 Dac 24.

⁹³ *State of Bombay v. Atmaram*, AIR 1951 SC 157.

can hardly be called a ground. If a person be detained because his grandfather who died long ago was guilty of breaches of public order it can hardly be urged that this is a ground in law. If it is to be a ground it must be a reasonable ground." From this observation it appears that the argument which sought to establish that the reasonableness of grounds is involved in the provision as to communication of grounds was conceded by the Court.⁹⁴

In a case under the Frontier Province Act XXI of 1948, the Sind Chief Court declared invalid an order of detention made on the ground that the person detained condemned inefficiency and corruption of the government. There was no logical connection between this ground of detention and the maintenance of public order, its professed object.⁹⁵

The rule laid down in *Keshav Talpade's* case⁹⁶ that if the grounds disclosed contained some grounds within the scope of the Act and some without, the order of detention would be invalid was regarded as not wholly correct by Muhammad Munir CJ, of the Lahore High Court, as he then was. In his opinion the rule appears to have been stated somewhat too broadly.⁹⁷ "It is well established that the Constitutional requirement that the grounds must not be vague must be satisfied with regard to each of the grounds."⁹⁸ Even though one ground is vague and the other grounds are not so, the detention is not in accordance with law and is, therefore, illegal.

Reference may be made to a case decided by the Punjab High Court where the petitioner obtained a Rule against the Indian Union to show cause why the order of detention by the Central Government passed under Section 3 of the Preventive Detention Act should not be set aside. The charge against the petitioner who

⁹⁴ *Govt. of East Pakistan v. Roushan Bijaya*, PLD 1966 SC at p.323.

⁹⁵ *Ghulam Mohd. Khan v. The Crown*, PLD 1949 Sind 12.

⁹⁶ AIR 1943 FC 1.

⁹⁷ *Rafiq Ahmad Sheikh v. Crown*, (In the matter of detention of Mr. Abdul Latif Afgani) PLD 1951 Lah 17 at p.22. His views were further qualified in *Mahbub Anam v. Govt. of East Pakistan*, PLD 1959 Dac 774.

⁹⁸ *Pushkar Mukherji v. State of West Bengal*, AIR 1970 SC 852; *Ram Krishan v. State of Delhi*, AIR 1953 SC 318; *Mrs Aruna Sen v. Govt. of Bangladesh*, (1975) 27 DLR 122.

was alleged to be an old worker in the cause of freedom movement of Kashmir for 25 years, was that he published certain articles the combined effect of which, according to the government, was prejudicial to the security of India.

The right to make a representation under Clause (5) of Article 33 is a valuable constitutional right, and not a mere formality. It further implies the proper consideration of the representation by the authority to whom it is made.¹⁰⁰ Since a representation against an order of detention loses both its purpose and meaning the detaining authority must consider the representation as expeditiously as possible.¹⁰¹ If the delay in considering the representation is not sufficiently explained, the continuance of the detention will be illegal.¹⁰² A mere sending of the representation to the Advisory Board without considering the same renders the detention illegal.¹⁰³ The consideration of the representation by a Deputy Secretary cannot be the same as consideration by the Government, the reasons being the ineffectiveness of the earlier Rules of Business and the Standing Orders relating to the exercise of the power to consider, "which were made on the basis that a Ministry would be functioning" and "laid down how the business of the government had to be transacted during the existence of the Ministry." Bhargava J, who delivered the judgment, further observed:

"When no Ministry at all existed, those Rules could obviously be no longer acted upon. Under the Presidential Rule the Governor was directly in charge of the Administration, so that the earlier rules relating to the manner in which the work was to be done, while Ministers were in office, could not remain effective".¹⁰⁴

Discretion to Withhold Facts

The proviso to Clause (5) of Article 33 empowers the detaining authority making an order of detention the discretion to withhold

¹⁰⁰ *Sk. Abdul Karim v. West Bengal*, AIR 1969 SC 1028; *Pankaj Kumar v. State of WB.*, AIR 1970 SC 97.

¹⁰¹ *Khairul Haque v. West Bengal*, (1969) 2 SCWR 529.

¹⁰² *Ibid.*

¹⁰³ *Loke Nath v. West Bengal*, (1969) 2 SCWR 582

¹⁰⁴ *Sashti Charan v. West Bengal*, (1969) 2 SCWR 547

facts which it considers to be against the public interest to disclose. Facts which cannot be required to be disclosed are those "which such authority considers to be against public interest to disclose."¹⁰⁵ But this reservation "implies that other facts to which no such objection applies must be disclosed."¹⁰⁶ Facts which can be revealed depends upon the facts of each case. "But they must, in any event, be such as would enable the person in question to make an effective representation as a total suppression of all material facts would render the constitutional safeguard illusory."¹⁰⁷ In *Liversidge v. Anderson* Viscount Maugham observed:

"It is beyond dispute that he can decline to disclose information on which he has acted on the ground that to do so would be contrary to the public interest, and that this privilege of the Crown cannot be disputed.....There must be a large number of cases in which the information on which Secretary of State is likely to act will be of a very confidential nature."¹⁰⁸

In the same case in Lord Macmillan's opinion, as preventive detention is only justified by reasonable probability distinguishable from a criminal conviction which can only be justified by legal evidence.

".....a Court of law manifestly could not pronounce on the reasonableness of the Secretary of State's cause of belief unless it were able to place itself in the position of the Secretary of State and were put in possession of all the knowledge, both of facts and of policy, which he had. However, the public interest must, by the nature of things, frequently preclude the Secretary of State from disclosing to a court or to anyone else the facts and reasons which have actuated him."¹⁰⁹

¹⁰⁵ *Lawrence D'Souza v. State of Bombay*, AIR 1956 SC 531. It was observed that "both the obligations to furnish particulars and the duty to consider whether the disclosure of any facts involved therein is against public interest, are vested in the detaining authority, not in any other."

¹⁰⁶ *Govt. of East Pakistan v. Rowshan Bijaya*, PLD 1966 SC 286.

¹⁰⁷ *Ibid.*; *Mrs. Aruna Sen v. Govt. of Bangladesh*, (1975) 27 DLR 122.

¹⁰⁸ (1942) AC 206 at p. 221.

¹⁰⁹ *Ibid.*, at p. 254.

In this case the appellant contended that where the Secretary of State, by declining to disclose his information, had failed, through no fault of his own, to justify the detention, he must be held confessed of having falsely imprisoned the detained person. But, on the other hand, where detention was most essential to the public safety, the information before the Secretary of State was bound to be of a confidential character; its disclosure should be precluded. In such cases if the appellant's contentions were accepted the 'Court is to be constrained where detention is most justifiable to find the detention unjustified'. To accept such an interpretation of the regulation, therefore, was not possible. The Court reached the conclusion that particulars of the grounds upon which the Home Secretary had reasonable cause to believe that a person was of hostile associations need not be furnished to him.

The proviso to Clause (5) has separated 'facts' from 'grounds'. 'Facts' means the evidence or data from which conclusions are derived. Clause (5) makes it obligatory to communicate the grounds but the proviso gives the authority the right to withhold particulars, if it would be against public interest to disclose them. 'A wide latitude is left to the authorities in the matter of disclosure.'¹¹⁰ At the same time it has been observed that facts may not be exhaustively disclosed but they should be sufficient for making a representation.

A comment made by Muhammad Munir, then Chief Justice of the Lahore High Court, at the reluctance of the detaining authority to disclose facts which led to making up an order of detention under the Punjab Public Safety Act XVIII of 1949 served on Inayatullah Khan Mashriqi, leader of a small but

¹¹⁰ *State of Bombay v. Atmaram*, AIR 1951 SC 157. The duty to supply further particulars where the grounds are vague was, however, explained in the following words: While the Constitution gives the Government the privilege of not disclosing in public interest facts which it considers undesirable to disclose...there is a clear obligation to convey to the detained person materials (and the disclosure of which is not necessary to be withheld) which will enable him to make representation....Any deviation from this rule is a deviation from the intention underlying Article 22 (5) of the (Indian) Constitution."

well-organised party known as 'Khaksars' bears mentioning. The grounds alleged were that he intended to raise a private army, seize power and invade India. To quote his words,

"In almost every case of detention under the Public Safety Act, the authority ordering detention, when questioned by the Court about the reason for the detention, mechanically repeats the formula of 'public safety and maintenance of public order', and displays a positive disinclination to the matter being probed further. While such disinclination is understandable where high affairs of state are concerned, I do not see why in ordinary cases, as for instance, where a man is arrested for defying law and order, intending to lead a banned procession, fomenting labour discontent or communal hatred, or for otherwise endangering the public peace, the authority ordering the arrest should not take the court and the public into confidence by giving a broad hint as to the reasons for the action taken. In such cases the Court does not desire to go into details or to ask for disclosure of the material on which the authority ordering the arrest formed his opinion, except to the extent that such information is relevant to the question whether the action taken was bonafide...."¹¹¹

Earlier in the case *In re Abdul Latif Afgani*¹¹² Muhammad Munir CJ opined that the attempts of the Court to know something more specific had been foiled by a mechanical incantation of the formula relating to the arrestor's satisfaction and the prejudice to public safety, which the arrestor might well have misunderstood.

Preventive Detention and Other 'Rights'

Before conclusion, it may be mentioned that a person who has been detained may contend that he has been deprived of his liberty guaranteed under Article 32 of the Constitution inasmuch as his deprivation was either under no law or law that is invalid. The Court may in such cases examine the validity of the impugned law from the point of view of contravention of Article 33.¹¹³

¹¹¹ *Inayatullah Khan Mashriqi v. Crown*, PLD 1952 Lah 331 at 345.

¹¹² PLD 1951 Lah 17.

¹¹³ *Gopalan v. State of Madras*, AIR 1950 SC 27.

But a person who has been preventively detained cannot raise objections to his liberties guaranteed under Articles 36 to 40 being taken away under the preventive detention laws and to his inability to enjoy the seven freedoms contained in those Article. These Articles have no application to a legislation dealing with preventive or punitive detention as its direct object and do not control under Article 33.¹¹⁴ An order of preventive detention cannot be held invalid on the ground that it violates the right of free movement guaranteed by the Constitution. Because, if this view be accepted a detainee would be entitled to urge that his other rights such as freedom of assembly, freedom of association, freedom of trade, business and profession and freedom to practise his religion, are also being violated. Experience, if not logic, would make it obvious that 'it is not possible to give effect to all these fundamental rights in a case of detention'. For example, a Muslim detainee can demand to exercise his right to say his prayers in a mosque or may want to perform pilgrimage to Mecca or to carry on other activities which cannot certainly be done while he is in custody. It cannot, however, be denied that a particular statute or order may violate more than one fundamental right. As KaikausJ observed, 'there can be a direct attack on more than one fundamental right by a particular statute or provision', but 'if the conditions for the loss of a particular right are fulfilled that right may be interfered with even though the indirect result is that the person concerned is unable to exercise another right'.¹¹⁵

Article 33 supplements Article 32 of the Constitution. The proper way of construction of these two Articles is that to the extent the procedure is prescribed by Article 33 the same is to be observed, if not, Article 32 has to be applied.¹¹⁶

¹¹⁴ *Ibid.*

¹¹⁵ *Government of East Pakistan v. Roushan Bijaya*, PLD 1966 SC at p. 323.

¹¹⁶ *Gopalan v. State of Madras*, AIR 1950 SC 27.

CHAPTER SIX

THE DEMOCRATIC FREEDOMS

1. Right Of Movement And Residence

Nature of the Right

Article 36 provides that every citizen shall have the right to move freely throughout Bangladesh and to reside and settle anywhere and to leave and re-enter Bangladesh. This right is again not absolute; reasonable restrictions may be imposed in the public interest. Though seemingly incongruous, the right to settle and stay in one place is included in and ancillary to the right of free movement.

Mention may be made that neither in the Constitutions of Pakistan, 1956 and 1962 nor in the Indian Constitutions the right to leave and re-enter was added to the right of free movement in the corresponding provisions of these Constitutions.¹ In this Article the right to leave and re-enter Bangladesh has been expressly inserted.

Blackstone recognised this right as basic.² In a Lahore case which considered the nature and extent of this right vested in the citizen under the Constitution of Pakistan, 1962 which he could rely upon and apply for allowing him to leave the country and go abroad at his own free will and pleasure, without any restriction, this right was recognised as inherent.³

The United States Constitution does not guarantee this right. Some feel that the framers of the Constitution thought it so obvious a right that its inclusion did not seem necessary, but others, however, think that it was deliberately omitted.

¹ Article 11 (a), Constitution of Pakistan, 1956, Fundamental Right No. 5, Constitution of Pakistan, 1962 and Article 19 (1) (d) and (5) Constitution of India deal with the right of movement.

² 1 Blackstone *Commentaries*, 134.

³ *Abul Ala Maududi v. State Bank of Pakistan*, PLD 1969 Lah 908.

The United States Supreme Court has, however, indirectly given it judicial recognition.⁴

In a case involving the extent of the right to withhold a passport if the applicant had refused to fill an affidavit concerning membership of the Communist Party Mr. Justice Douglas of the United States Supreme Court stated:

"The right to travel is a part of the liberty of which the citizen cannot be deprived without the process of law under the Fifth Amendment.... Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country...may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of Movement is basic in our scheme of values."⁵

The Supreme Court expressed the opinion that the Congress did not empower the Secretary of State to deny passports because of alleged Communist beliefs. It did not however, examine the extent to which the constitutional right to travel protected by this decision could be curtailed.

The United States Supreme Court was required to consider the constitutionality of Section 6 of the subversive Activities Control Act, 1950 which granted power of refusal to issue passports to members of the Communist party.⁶ The Court declared the Act unconstitutional because on its face it was an invasion of liberty guaranteed by the Fifth Amendment:

"Freedom of movement, home and abroad, is important for job and business opportunities—for cultural, political and sound activities—for all the commingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy..... This freedom of movement is the very essence of our free society, setting us apart, like the right of assembly and the right of association, it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person."

⁴ *Edwards v. California*, 314 US 160 (1941). A citizen cannot be prevented from travelling within or without the country, unless there is power to detain him, *Ex Parte Endo*, 323 US 283 (1944).

⁵ *Kent v. Dulles*, 357 US 116 at pp. 125-126 (1958).

⁶ *Aptheker v. Secretary of State*, 378 US 500 (1964). This case was distinguished in *Zemel v. Rusk*, 381 US 1 (1965).

The judicial uncertainty as to whether the right of free movement include.....right of exit and re-entry which arose due to the aforesaid omission has been set at rest in both India and Pakistan. In *Satwant Singh Sawhney v. The Government of India*⁷ the Supreme Court of India observed that the withholding of a passport deprived a citizen of his right to travel abroad:

“This right was a right which every person living in India, whether a citizen or not enjoyed. No person should be deprived of this right to travel, except according to the procedure established by law. There existed no law made by the State regulating or depriving persons of the right to travel.”

The views expressed in *V. G. Row v. The State of Madras*⁸ that the issuing a passport being the function of the Ministry of Foreign Affairs is not open to judicial review has, therefore, become obsolete. In *Abul Ala Muadudi v. The State Bank of Pakistan*⁹ the right of free movement along with the right against deprivation of life or personal liberty save in accordance with law was considered. It was observed that:

“The liberty of free movement in a person to go abroad is strictly subject to and regulated and controlled by the provision of any valid law for the time being in force in the country. He is bound by and subject to the law of the land, which must be obeyed.”

To what extent the right to travel abroad can be curtailed has not so far been examined in any case after the Constitution of Bangladesh has guaranteed this right.

Personal liberty which is guaranteed by Article 32 and viewed as freedom of locomotion¹⁰ is to be distinguished from the freedom of movement secured under Article 36 of the Constitution. The former Article applies to all persons, but the latter gives protection to the citizens of Bangladesh. “The two freedoms

⁷ AIR 1967 SC 1836. Here, right to travel abroad was recognised as a fundamental right.

⁸ AIR 1954 Mad 240.

⁹ PLD 1969 Lah 908.

¹⁰ Blackstone, *Commentaries*, Volume 1, page 134—“Personal liberty consists in the power of locomotion of changing situations, or removing one’s person to whatever place one’s inclination may direct, without imprisonment or restraint unless by due course of law.”

although akin each other in certain respects, are at the same time distinct and separate"; they are not identical and proceed on different principles, they do not deal with the same subject."¹¹

The Average Prudent Man

What is the criterion for determining the reasonableness of restrictions imposed by law on the enjoyment of such fundamental rights as freedom of movement, assembly, association, speech and the right of privacy of correspondence and other means of communication? Some Constitutional lawyers have found it convenient to employ a legal concept often used in the law of torts.

The Indian Supreme Court first attempted to usher the average prudent man into the field of Constitutional laws as the arbiter of the reasonableness of a particular legislation. While considering whether the provisions of the East Punjab Public Safety Act, enabling a District Magistrate to make an order of externment, imposed an unreasonable restriction on the citizen's right of free movement, the Court said:

"It is not possible to formulate an effective test which would enable us to pronounce any particular restriction to be reasonable or unreasonable *per se*. All the attendant circumstances must be taken into consideration and one cannot dissociate the actual contents of the restrictions from the manner of their imposition or the mode of putting them into practice. The question of reasonableness of the restrictions imposed by a law may arise as much from the substantive part of the law as from its procedural portion." If this be the actual position to be taken into consideration by the Court, his statement immediately following can be objected to. He observed that "the reasonableness of a challenged legislation has to be determined by a court and the court decides such matters by applying some objective standard which is said to be the standard of an average prudent man".¹²

While it can be imagined that the conduct of a party to a suit may be determined as reasonable or unreasonable by such an

¹¹ *Abul Ala Maududi v. State Bank of Pakistan*, PLD 1969 Lah 908; *A. K. Gopalan v. State of Madras*, AIR 1950 SC 27.

¹² *Khare v. State of Delhi*, AIR 1950 SC 211; *Oali Ahad v. Govt. of Bangladesh*, (1974) 26 DLR 376.

objective standard, this is not so in cases where the decision would involve a pronouncement on the reasonableness or unreasonableness of a statute or an executive order passed by the government restricting the fundamental rights of a citizen. However, the meaning of the standard of a reasonable man of ordinary prudence may be considered.

In cases of torts involving negligence an abstract formula was invented to measure the standard of conduct of the defendant in order to give protection to the plaintiff against unreasonable risk or harm. If the conduct of the defendant was seen to fall below that standard, he was held liable for the consequence arising out of it. This standard to which the defendant should conform is the standard of an average prudent man. The formula which has been traditionally employed to convert the problem of judging the conduct of the particular defendant involved in a case of negligence into an abstraction, is used to pass the negligence issue to the jury for determination. Its progenitor is *Tindal, C.J.*¹³ An average prudent man has been described by Greer L.J. as "the man in the street", or "the man in the Clapham omnibus",¹⁴ or as an American author said,

¹³ *Vaughan v. Menlove*, (1837) 3 Bing.N.C. 468, 475—"Instead therefore, of saying that the liability of negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."

¹⁴ "Such a man taking a ticket to see a cricket match at Lord's would know quite well that he was not going to be encased in a steel frame which would protect him from the one in a million chance of a cricket ball dropping on his head. In the same way, the same man taking a ticket to see the Derby would know quite well that there would be no provision to prevent a horse which got out of hand from getting amongst the spectators, and would quite understand that he was himself bearing the risk of any such possible but improbable accident happening to himself. In my opinion, in the same way such a man taking a ticket to see motor races would know quite well that no barrier would be provided which would be sufficient to protect him in the possible but highly improbable event of a car charging the barrier and getting through to the spectators. The risk of such an event would be so remote that we would quite understand that no provision would be made to prevent it happening, and that he would take the risk of any such accident,"; *Hall v. Brooklands Auto Racing Club*, (1933) 1 KB 205, 224.

the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves."

The average prudent man, as a discussion of the negligence cases would reveal is not a concrete individual, but an abstraction invented by the judges. The judges have gradually invested him with all the qualities demanded of a good citizen. sometimes he is asked to approximate to perfection. Though a certain average of conduct is expected of every man living in society and is necessary for the general welfare, the "average prudent man," must never fall below that standard, of course, the concept of the average prudent man furnishes the jury or the judge with an intelligible guide to an external objective standard in forming their assessment of the quality and nature of the defendant's conduct. When in a particular case a judge or a jury pronounces that the conduct of the defendant did not conform to that of an average prudent man, what he or they actually mean is that the defendant's conduct did not come up to his or their expectation of his conduct in those circumstances.

The employment of this concept of the 'reasonable man' in deciding the reasonableness of restrictions imposed on the various rights guaranteed by the Constitution to the citizen under Articles 36, 37, 38, 39 and 43 may be subjected to criticism on the ground that even an average prudent man, as defined in the cases involving negligence, has neither the technical qualifications nor the legal or political knowledge to understand whether a restriction imposed, for instance, the freedom of speech and expression or the freedom of movement, assembly or association, is reasonable or not. Not only the average prudent man for whom might be substituted "any reasonable member of the public", but even legislators and lawyers find it difficult sometimes to say whether a restriction imposed, for example, on freedom of expression, is reasonable or unreasonable from the viewpoint of the security of the State, public order, defamation or contempt of court. If the average prudent man is equipped with all the qualifications and skill of a politician and a lawyer, by the same

judicial process of abstraction as has endowed him with all the excellent qualities of a good citizen to determine the negligence issue, only then can he be introduced in the cases involving constitutional interpretation of the fundamental rights and the reasonableness of restrictions placed on them either by the executive or the legislature. Until that has been done, the reasonableness of restrictions has to be determined by the judge himself. Moreover, the word 'reasonable', used to qualify the restrictions that might be placed on the fundamental rights, such as right of free speech and expression, right of free movement or residence has only thrown open the legislation or the executive order interfering with those rights to the close scrutiny of the courts. And in our view it is only the judges who can after hearing prolonged arguments by the lawyers on both sides, and a due application of their high intellect and skilled knowledge of law, both substantive and procedural, and their high sense of values, decide whether a particular restriction is reasonable or unreasonable. Sometimes their determination is seen to involve a question of policy or highly philosophical and legal considerations.

The concept of an average prudent man has become not only unavoidably necessary for being employed in constitutional cases in this sub-continent which require the consideration whether restrictions imposed on the democratic freedoms of the citizens by any legislative measure are reasonable or not but this has been employed elsewhere too. Even for example, in cases involving the freedom of speech and assembly in Britain the concept of a reasonable man was canvassed and considered by the Court.¹⁵

Reasonable Restrictions

In considering the question whether the power to make an order of externment, the satisfaction of the officer concerned being final, was an unreasonable restriction on the citizen's right within the meaning of Article 19(5) of the Indian Constitution, corresponding to Article 36, the Indian Supreme Court felt that

¹⁵ *Jordan v. Burgoyne*, (1963) 2 QB 744.

the vesting of authority in particular officers to take prompt action entirely on their own responsibility or personal satisfaction was not necessarily unreasonable.¹⁶ Abuse of the power given by a law sometimes occurred, but the validity of the law could not depend on the possibility of its abuse. The period of three months for which an order of externment might be passed by the District Magistrate was not *prima facie* unreasonable, even though the externnee had no remedy during that time. Further, the reasonableness of the restrictions had to be considered both from the point of view of the procedural, as well as of the substantive, parts of the law. It was observed that :

“It is not disputed that under Clause 5 of Article 19, reasonableness of a challenged legislation has to be determined by a court and the court decides such matters by applying some objective standard which is said to be the standard of an average prudent man. Judged by such standard which is sometimes described as an external yard stick, the vesting of authority in particular officers to take prompt action under emergency circumstances, entirely on their own responsibility or personal satisfaction, is not necessarily unreasonable. One has to take into account the whole scheme of legislation and the circumstances under which the restrictive orders could be made.”¹⁷

An order was made under the provisions of Section 27(1) of the City of Bombay Police Act, 1902 directing the petitioner to remove himself from Greater Bombay within a certain date. The provisions were, as is obvious, made in the interest of the members of the public, that is, to protect them against dangerous and bad characters whose presence in a particular locality may be undesirable, but, nonetheless they imposed restrictions upon the right of movement of a citizen. Since the determination of the question whether the restrictions were reasonable or not depended upon the procedural as well as substantive parts of the law, the Court, having considered the maximum duration of the externment order, the menace it wanted to avert and the discretion of the Police Commissioner to allow the person

¹⁶ *N.B. Khare v. State of Delhi*, AIR 1950 SC 211.

¹⁷ *Ibid.*, at 217.

concerned to enter the prohibited area before the expiry of the period, found it difficult to hold that the provisions were unreasonable. Also, the procedure which did not allow the suspect to cross-examine the witnesses on whose evidence the proceedings were initiated, though exceptional, aimed to protect them against violence to their person or property and this object would be frustrated if a right to confront them was given to the suspect.¹⁸

A law which subjects a citizen to the penalty of virtual forfeiture of his citizenship upon conviction for a mere breach of the permit regulations, or upon a reasonable suspicion of having committed such a breach cannot be justified upon the ground that it imposes a reasonable restriction in the interest of the public on the right to reside and settle in the country. Thus, in *Ebrahim Vazir Mavat v. State of Bombay*¹⁹ the Constitutional validity of Section 7 of the Influx from Pakistan Control Act, 1949, was questioned. The Act purported to control admission into and regulate the movement in India of persons entering from Pakistan. It was held that the impugned section overstepped the limits of control when it provided for removal of a citizen from his own country. The Court declared that the provisions of the Act had no reasonable relation to the object in view but was so drastic in scope that it went much in excess of that object.

The restrictions on movements of citizens contemplated by Section 14 (2) of the Punjab Control of Goondas Act, 1951 were challenged as infringing the Constitutional provisions relating to the right of movement guaranteed by the Constitution of Pakistan, 1956.²⁰ It was held that confinement under Section 14 (2) of the Act was not of perpetual complexion and not dependent on the sweet will of the Tribunal as to the extent of the area and as such it was not unreasonable. The Court observed:

¹⁸ *Gurbachan Singh v. State of Bombay*, AIR 1952 SC 221

¹⁹ AIR 1954 SC 229; *Chintamon Rao v. State of Madhya Pradesh*, AIR 1951 SC 118.

²⁰ *Bazal Ahmad Ayyubi v. West Pakistan*, PLD 1957 Lah 388.

"There is ample authority for the proposition that in deciding whether any particular law provides for reasonable restrictions on this fundamental right, not only the substantive but also the procedural part by which the eventual result is secured, has to be scrutinized. The court has to consider the nature of the restrictions, the manner in which they are imposed and their extent, both territorial and temporal."

In an earlier case it was held that insofar as the Security of Pakistan Act, 1952, omitted to provide for the furnishing of grounds to a person who had been externed, the Act imposed an unreasonable restriction on the right of movement guaranteed by the Constitution.²¹

The reasonableness of restrictions on the free movement of a citizen has, as already seen, to be judged by the substantive as well as the procedural parts of the law. In a case in which habeas corpus petitions were moved on behalf of several persons interned under Section 5 of the Punjab Public Safety Act, 1949 which permitted an order of internment to be passed against a Pakistan citizen without furnishing the grounds to him of affording an opportunity to represent against such order, the Court held that it imposed an unreasonable restriction on his freedom of movement and was, therefore, void.²² In the opinion of the Court the order of internment within a specified area falls more appropriately within Article 11 than within the scope of the preventive detention in Article 7 of the Constitution of Pakistan, 1956, corresponding to Article 33.

Where the Act provides for externment, prohibition against visiting a specified locality, or restriction of movement to any specified area, it was held that as the Act did not have as their direct object either preventive or punitive detention, they attracted the Constitutional provisions guaranteeing freedom of movement.²³ The opinion was expressed that attraction of this guarantee to cases of externment or internment did not, however

21 *Quddus v. Chief Commissioner of Karachi*, PLD 1956 Kar 533.

22 *Row Mahroz Akhtar v. District Magistrate*, PLD 1957 Kar 676

23 *Laiq Ahmed v. District Magistrate*, PLD 1958 Kar 92.

exclude the application of Article 7 of the Constitution of Pakistan, 1956, which corresponds to Article 33.

In a case before the Madras High Court, Section 33 of Laccadive Islands and Minicoy Regulation, 1912 was impugned as contravening Article 19 (1) (d) (e) and (5). The Court observed that the peculiar situation of these islands together with the backwardness of the inhabitants and the need to protect them against exploitation by more advanced classes of citizens of India rendered it necessary to impose considerable restrictions upon the mainlanders' proceeding to or staying in the islands. In the opinion of the Court even the imposition of a complete prohibition of mainlanders visiting the islands or remaining there would not in those circumstances be beyond the competence of the law.²⁴

In considering whether the provisions of the Control of Shipping Act, 1947 which aimed to restrict the movement of an ocean-going vessel by requiring its owners to obtain a licence which may specify the trade in which it may engage, the voyages it may perform and which may impose conditions even in regard to the engagement of the vessel in such trade or its performance of the voyages permitted put unreasonable restrictions upon the right of movement guaranteed by Article 11 of the Constitution of Pakistan, 1956 the Supreme Court of Pakistan accepted the government contention that the State must keep itself informed of every ship registered in Pakistan, when it is engaged outside the interwing trade in the public interest (Pakistan then consisted of two wings, East Pakistan and West Pakistan separated by nearly a thousand miles). Cornelius J, as he then was, viewed the government necessity of having complete information of the whereabouts of each registered vessel as reasonable, because, otherwise it may not meet the most urgent requirement of extra cargo space which may arise at any time. In his opinion, a reasonable restriction is

²⁴ *Thattikarantivila Bamban v. Island Inspecting Officer*, AIR 1957 Mad 433.

"One which is imposed with due regard to the public requirement which it is designed to meet. Anything which is arbitrary or excessive will of course be outside the bounds of reasons in the relevant regard, but in considering the disadvantages imposed upon the subject in relation to the advantage which the public derives, it is necessary that Court should have a clear appreciation of the public need which is to be met and where the statute prescribes a restraint upon the individual, the Court should consider whether it is reasonable restraint, in the sense of not bearing excessively on the subject, and at the same time being the minimum that is required to preserve the public interest."²⁵

A restriction which is imposed for an indefinite period or is disproportionate to the mischief sought to be prevented or if there is no safe-guard against arbitrary exercise of power is unreasonable. In the words of Cornelius CJ,

"Where grave danger to the public safety or public order is involved, reasonable restriction upon the freedoms guaranteed by the constitution are ensured in respect of peremptory executive actions to avert the danger, if opportunity is provided as soon thereafter as may be convenient for exercise by the person affected of the right to represent that the restraint was not justified in relation to the factual requirements of the law applied, or that in other ways the restriction lacked the elements of reasonableness."²⁶

In considering whether Rule 51 framed under the Chittagong Hill Tracts Regulations, 1900 which enables the Deputy Commissioner to put restriction on the freedom of a person if he is satisfied that the latter's presence in the district is or may be injurious to the peace of good administration of the district, the Dacca High Court expressed the view that the restrictions did not satisfy the test of reasonableness.²⁷

²⁵ *Messrs East West Steamship Co. v. Pakistan*, PLD 1958 SC 41.

²⁶ *Abul Ala Maudoodi v. Government of West Pakistan*, PLD 1964 SC 673.

²⁷ *Mostafa Ansari v. District Commissioner*, PLD 1965 Dac 576. Rule 51 is as follows: "Expulsion of undesirable persons—If the Deputy Commissioner is satisfied that the presence in the district of any person who is not a native of the district, is or may be injurious to the peace or good administration of the district, he may, for reasons to be recorded in writing, order such person if he is within the district to leave the district within a given time or if he is outside the district forbid him to enter it".

As the rule did not provide an opportunity to show cause why he should not be ordered to leave the district nor enabled him to be present before the Deputy Commissioner to challenge the source or veracity of any adverse report against him, the Deputy Commissioner could turn a person out of the district for ever. Any disobedience or neglect to obey the order entailed imprisonment extending upto two years or with fine or with both. The rule contemplated peremptory expulsion from the district or total embargo on entry into the district. Salauddin J observed:

“It is, therefore, evident that such unlimited power with such far reaching consequences and without any check and without remedy of a judicial character provided to the aggrieved person to obtain redress of his grievances do not satisfy the test of “any reasonable restrictions imposed by law in the public interest”. The restriction under the rule is for an indefinite or an unlimited period. It is disproportionate to the mischief sought to be prevented Viz. “is or may be injurious to the peace or good administration of the district”.

2. Right of Assembly

Its Nature and Origin

Article 37 purports to guarantee the right to assemble and to participate in public meetings and processions peacefully and without arms.²⁸ The rights of assembly, meetings and processions are regulated by law but the Article has emphasised their importance as constitutional rights. The rights are not absolute. Reasonable restrictions may be imposed in the interest of public order or public health.

The denial of any general right to carry arms, as implied by the Arms Act, 1878, has been recognised in Article 37. Section 144 of the Bangladesh Penal Code prescribes a greater punishment for the person who joins an unlawful assembly with

²⁸ This Article may be contrasted with Article 9, Constitution of Pakistan, 1956 and Fundamental Right No. 6, Constitution of Pakistan, 1962. None of them expressly mentioned the right to participate in public meetings and processions or provided that reasonable restrictions may be imposed in the interest of public health. They resembled the corresponding provisions in Article 19(1) (b) of the Indian Constitution.

deadly weapons. But Article 37 puts a further limitation by providing that a citizen is not constitutionally protected if he carries arms to an assembly, whether lawful or unlawful. The right of assembly is cognate to those of movement and also of free speech and free press.²⁹ Some consideration of the nature and origin of the right of assembly will be useful before the discussion of the limitations on such right. Since the tradition of free speech and assembly as developed through legislations and judicial decisions in Britain and the U.S.A. lies at the root of the constitutional guarantee relating to and the limits imposable on these rights in the countries of this sub-continent, a brief reference to their origins in the former countries may be made.

Dicey gives an ingenious theory of the origin of the right of assembly in England. He said:

“It can hardly be said that our constitution knows of such a thing as any specific right of public meeting.....The right of assembling is nothing more than a result of the view taken by the courts as to individual liberty of person and individual liberty of speech.”³⁰

The better opinion would, however, seem to be that the right of assembly is an original independent right, not a right subsidiary and ancillary to the right of speech. Further, as has been observed by two distinguished authors, Dicey's view “does not recognise or afford any guaranteed right; rather does it throw upon an objector to the exercise of the so-called right of assembly the necessity of proving the breach of some provisions of law or of the law of tort.”³¹

In England, both common law and statute assisted in the development of the right of assembly. The modern law of England regards as an unlawful assembly “an assembly of three or more persons with intent either (a) to commit a crime by open force or, (b) to carry out any common purpose, lawful or

²⁹ *Nasrullah Khan v. District Magistrate*, PLD 1965 Lah 642. “The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental, *De Jonge v. Oregon*, 299 US 353 (1937).

³⁰ *Law of the Constitution*, p. 271, 10th ed. (1964).

³¹ Wade and Phillips, *Constitutional Law*.

unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it”.

The law of unlawful assembly which involves the problem of the hostile audience is seen to deal with the power of the police to prevent the breaches of the peace.³²

In the United States of America certain limitations have been upheld as constitutional. In the leading case involving the right of assembly it was held that the right of the people peaceably to assemble for lawful purposes, with the obligation on the part of the States to afford them protection, existed long before the Constitution was framed:

“In fact, it is, and always has been, one of the attributes of citizenship under a free government. It “derives its source”, to use the language of Chief Justice Marshall, (in *Gibbons v. Ogden*, 9 wheat, 211), ‘from those laws whose authority is acknowledged by civilized man throughout the world’. It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution.”³³

If the purpose of the assembly is clearly to disturb public order, the right of assembly may be curtailed. As Mr. Justice Brandeis said:

“But although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral.”³⁴

³² *Beatty v. Gillbanks*, (1882) 15 Cox 138; *Wise v. Dunning*, (1902) 1 KB 167; *Duncan v. Jones*, (1936) 1 KB 218. The result of the last mentioned case “seem to be that the police may now be held to be acting in the course of this duty in issuing orders, silencing speakers, or even committing assaults, if their activities are directed to preventing the probable disorderly consequences of a meeting or procession”,—*Geoffrey Marshall, Constitutional Theory*, at p. 163 (1971)

³³ *United States v. Cruikshank*, 92 US 542 at 551 (1875). The First Amendment to the United States Constitution declares ‘Congress shall make no law.....abridging the right of the people peaceably to assemble.’

³⁴ *Whitney v. California*, 274 US 357 at 375 (1927); In *Nasrullah Khan v. D.M.*, PLD 1965 Lah 642.

He further observed that the necessity which is essential to a valid restriction does not exist unless the speech produces a clear and present danger of some substantive evil which the state may seek to prevent. The right of assembly cannot be allowed to encroach upon the interest of the community in maintaining peace and order in city streets or public places.

“The offence known as the breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts but acts and words likely to produce violence in others.....When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order appears, the power of the State to prevent or punish is obvious.”³⁵

An unlawful assembly creates a situation which presents an “analogy to a fire with obvious danger of a conflagration if not checked”. Limitations may be imposed to assemblies whose avowed object may be to achieve some public or political benefits, to effect any change in public law or to remedy some public or general grievance as well as to secure some private right or to rectify some private wrong. Every meeting where violent, boisterous or uproarious conduct may occur should not be branded as unlawful assembly.

In *Whitney v. California*³⁶ the Supreme Court of the United States, in sustaining the criminal syndicalism law of California, said :

“We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the state, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the state.”

In concurring with the majority opinion Mr. Justice Brandeis stated that if authority is to be reconciled with freedom, only an emergency can justify repression. In his opinion, “Prohibition of free speech and assembly is a measure so stringent that

³⁵ *Cantwell v. Connecticut*, 310 US 296 at p. 308 (1940); *Feiner v. New York*, 340 US 315 (1951).

³⁶ 274 US 357 at 372 (1927).

it would be inappropriate as the means for averting a relatively trivial harm to society". He said that the Act merely created a rebuttable presumption that there existed a clear and present danger.

"Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature."

The need for balancing the conflicting interests such as the right to assemble peaceably and without arms and the maintenance of public order was emphasised in a case before the Lahore High Court.

"If the State is in danger the liberties of the subjects are themselves in danger. It is for these reasons of State that an equilibrium has to be maintained between the two contending interests at stake; one the individual liberties.....and the other the need to impose social control and reasonable limitations on the enjoyment of those rights in the interest of the collective good of the society."³⁷

From this statement it seems that only unreasonable or arbitrary violations of constitutional rights and liberties will be declared invalid, but it gives no indication as to the kind of restrictions that may be declared unreasonable.

Chapter VIII of the Bangladesh Penal Code deals with offences against the public tranquillity. These may be classified in the four groups, namely, unlawful assembly (Sections 141-145), rioting (Section 146), promoting enmity between different classes (Section 153A) and affray (Section 159).³⁸

³⁷ *Nasrullah Khan v. District Magistrate*, PLD 1965 Lah 642; *Oali Ahad v. Govt. of Bangladesh*, (1974) 26 DLR 376

³⁸ Section 141 defines an unlawful assembly as an assembly of five or more persons if the common object of the persons composing the assembly is—
First: To overawe by criminal force, or show of criminal force (the Government or Legislature), or any public servant in the exercise of the lawful power of such public servant; or,
Second: To resist the execution of any law, or of any legal process; or,
Third: To commit any mischief or criminal trespass, or other offence; or,
Fourth: By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive

Reasonable Restrictions

In a case before the Lahore High Court the petitioner challenged the order of the District Magistrate, Lahore, under Section 144 of the Code of Criminal Procedure which prohibited him from holding a public meeting to commemorate the birth of the Prophet as contravening Article 9 of the Constitution of Pakistan, 1956, corresponding to Article 37, inasmuch as the order did not forbid discussion of a particular topic nor require that a particular person should not address the meeting, but was of a general nature, prohibiting altogether the assembly of five or more persons for a period of two months. Changez J said that the Court would never countenance any attempt at illegal encroachment on the liberty of the subject:

"These rights are a part of the priceless treasure of the citizen, and in the absence of reasonable restrictions imposed by law, every citizen has the right to enjoy them to their maximum. The executive should, therefore, be on its guard to exercise its powers under the law with due care and caution so that their orders do not impinge on the fundamental rights of the people in excess of the reasonable restrictions which can be imposed under the law. But if reasonable restrictions are imposed in accordance with law, then the citizen should have no ground to complain, for his individual interests of maintaining peace and public order in the country."³⁹

any person of the enjoyment of a right of way, or of the use of water, or, other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or,

Fifth: By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation: An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

Under Section 144 of the Code of Criminal Procedure, a magistrate may pass an order forbidding the holding of public meeting or processions in a specified area. Such an order may remain in force for two months.

³⁹ *Abdul Hamid Qadri v. District Magistrate*, PLD 1957 Lah 213. In *Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884, the Indian Supreme Court while rejecting the contention that Section 144 of the Code of Criminal Procedure violated the freedom of speech and expression guaranteed by the Constitution, pointed out that since it intended to secure public weal and provided that the Magistrate in exercising powers should act judicially and the restraints to be imposed were of a temporary nature, it was not violative of Article 19. The constitutionality of Section 144 (1) was upheld in *Madhu Limaye v. The Sub-Divisional Magistrate*, AIR 1971 SC 2486

In the same case it was held that if the restrictions imposed by the District Magistrate were unreasonable, the order, although it might be within the scope of Section 144, would be repugnant to Article 9. It was further pointed out that restrictions should be either complete or partial, and if, in the circumstances of a case, total prohibition of the exercise of a particular fundamental right was reasonable for achieving a purpose for which the imposition of restriction was permissible, then even the total prohibition of the exercise of such a right would be legal and valid. Drastic remedies may be necessary to meet conditions in an emergency giving rise to serious and urgent problems.

However, the Court, in enunciating the test of reasonableness of restrictions, said:

“.....several circumstances shall have to be taken into consideration, including the conditions prevailing at the time, and the nature, extent and duration of the restrictions of the fundamental right having regard to all the surrounding circumstances of the case. It is possible that in one set of circumstances, the restrictions imposed may be quite unreasonable, while in a different set of circumstances they may be reasonable. There cannot be laid down any absolute and fixed standard by which to test the reasonableness of restrictions upon fundamental rights, but it can be safely assumed that in judging the same an objective standard, i.e. the standard of the average prudent man shall have to be applied.”

According to the Allahabad High Court a restriction of the nature provided by Section 14 of the U. P. Opium Act, 1934, which made it an offence for members of an opium smoking assembly to assemble together was a reasonable restriction on the exercise of the right of assembly and did not contravene this right guaranteed by the Indian Constitution.⁴⁰

In a very recent case the question as regards the constitutionality of two orders passed successively under Section 144 of the Code of Criminal Procedure prohibiting the holding of any public meeting, demonstrations, rallies and processions in the City of Dacca and Narayanganj came up for consideration of

⁴⁰ *State v. Mangala*, AIR 1957 All 753.

the Supreme Court.⁴¹ Since a Magistrate who passes an order under Section 144 is required to act judicially, he must state material facts in the order so as to indicate some sort of connection between the prohibited acts and the apprehended danger. As the impugned order did not mention how the prohibited acts, namely, holding of meetings, processions, rallies or demonstrations might have had any effect on the combined operation of the Armed Forces and the civil authority for the recovery of illegal arms, the order was not regarded as a valid order within the meaning of Section 144.

So far as the question related to the constitutionality of the section it involved the consideration whether Section 144 violates Article 37 of the Constitution of Bangladesh and, secondly whether, in case of Section 144 being held to be constitutional, the impugned order itself is violative of Article 37, and as such was beyond the scope of that section.

Since in order to answer the first question it was necessary to determine the reasonableness of the restrictions prescribed by Section 144, the Court proceeded to examine the background of the constitutional provisions contained in Article 37 of the Constitution.

Restrictions on the right of assembly were only permitted in the interest of "public order". Danger to human life and safety, and disturbance of the public peace come within the purview of that expression. If a magistrate was satisfied that it was necessary to prohibit a public meeting to prevent danger to life and safety and disturbance of the peace, an order to that effect under Section 144 of the Code of Criminal Procedure could be passed by him but whether it did or did not encroach on the right guaranteed by Article 37 of the Constitution may be examined by the Court. The restriction on the right to assemble as imposed by the second portion of the operative part of Section 144 (1) was held not to be unreasonable. Further, it was held that the word 'restrictions' as used in Article 37 is wide enough to include total prohibition of the right guaranteed therein for a temporary period, if it may be regarded as reasonable for the purpose of public order.

⁴¹ *Oali Ahad v. Govt. of Bangladesh*, (1974) 26 DLR 376.

The right to assemble peacefully must not be exercised to the detriment of the citizens' right to enjoy their property, or in Government offices.

"There is no fundamental right for anyone to hold meetings in Government premises. If it is otherwise, there is bound to be chaos in offices. The fact that those who work in a public office can go there does not confer on them the right of holding a meeting at that office even if it be the most convenient place to do so."⁴²

These observations were made by the Indian Supreme Court while considering the challenge to the order of the General Manager, Northern Railway, prohibiting the railway workers from holding meetings within the railway premises. As there was neither any law nor usage enabling the railway workers to hold meetings in railway premises, no valid objection could be made to the direction given by the General Manager.

Provisions of Section 8 of the West Pakistan Maintenance of Public Order Ordinance, 1960 which authorised the District Magistrate to depute one or more police officers not below the rank of a head constable, or any other person to attend any public meeting for the purpose of causing a report made of the proceeding were impugned as infringing the right of assembly guaranteed by the Constitution.⁴³ In the explanation to the section a public meeting was defined as "Any meeting which is open to the public or to any class or portion of the public, and a meeting may be public meeting notwithstanding that it is held in a private place and notwithstanding that admission thereof is restricted by tickets or otherwise."

The Court repelled the argument that the District Magistrate when acts under the aforesaid section had no power to interfere in any of the proceeding of the public meeting, his nominees were expected to sit and take notes of the proceedings and do nothing more and, therefore, his order did not curtail the freedom to assemble: "Indeed, the very fact that the proceedings of a meeting are being watched under the orders of the District

⁴² *Railway Board v. Niranjan Singh*, AIR 1969 SC 966.

⁴³ *Nasrullah Khan v. District Magistrate*, PLD 1965 Lah 642.

Magistrate, is bound to deter people to assemble and discuss things freely, many of them may not even like to attend such a meeting. The powers conferred on the District Magistrate in this behalf are likely to act as a deterrent in the way of the public to assemble together and may even stifle the meeting altogether."

Whether a meeting of the executive committee of a political organisation in a room of a hotel constitute a public meeting was also considered in this case, the Court expressed the view that a meeting held in the secrecy of a public place not open to public view may be considered a public meeting, and that also, a public meeting will not cease to be so if the admission is restricted by ticket or otherwise, provided it is open to the public or a class or portion of the public. It is true a political organisation may hold a public meeting by extending invitation to the public or a class or a portion of the public in general. But for this reason it cannot be said that a political organisation which convene a meeting of the executive to which admission is restricted to the members by name and which is not accessible to the public or a class or a portion of a public will constitute a public meeting within the meaning of Section 8 of the Ordinance. A mere conglomeration of a group of persons cannot constitute a public meeting viewing them as members of the public for, this would not only be absurd but would produce unexpected result by obliterating the distinction between a public meeting and a private meeting. A meeting between a husband and a wife or members of a family in the privacy of their home, and of the students in class rooms would then constitute a public meeting which is not intended by Section 8 of the Ordinance. In the words of Akram J,

"A public meeting is, therefore, a meeting to which the public or any class or portion of the public as such is invited or admitted, no matter whether the admission thereto is general or restricted. The members of the public are permitted to attend the meeting which is accessible to them in their capacity and character as the members of the public and the admission is open to them as such."

Though the right to taking out a procession has been protected by Article 37 of the Constitution, it may be prohibited by an order passed by a magistrate.⁴⁴ Whether reasonable ground

⁴⁴ Section 144, *Code of Criminal Procedure*.

for apprehending that a procession may occasion the breach of the peace or serious public disorder must exist before organising the procession may require fresh judicial determination after the coming into force of the Constitution guaranteeing the right to participate in a procession.

In Britain, it is not easy to separate the law relating to procession from that relating to meetings.⁴⁵ An assembly on a public highway or street is considered as a public nuisance and is, therefore, punishable.

A claim on the part of persons so minded to assemble in any numbers, and for as long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it.⁴⁶

A citizen has the right to use the streets, but cannot be allowed to exercise this right by creating obstruction to others by standing or by making or listening to a speech.

3. Right of Association

Implications of the Right

Article 38 of the Constitution guarantees to every citizen the right to form associations or unions, but reasonable restrictions may be imposed in the interest of morality or public order. This right is similar to those guaranteed by Article 10 of the Constitutions of Pakistan of 1956 and Fundamental Right No. 7 of the Constitution of Pakistan, 1962.

In Bangladesh, the freedom of association includes the right to form companies under the Companies' Act, 1913, partnerships

⁴⁵ Wade and Phillips, *Constitutional Law*.

⁴⁶ *Ex parte Lewis*, (1888) 21 QBD 191 at p. 197. In *Regina v. Clark (No. 2)*, (1963) 3 WLR 1067, Lord Parker CJ quashed the conviction of the defendant who was charged for committing the offence of public nuisance by an obstruction of the highway on the ground that the jury was not directed on the question whether there was or was not a reasonable user of the highway.

under the Partnership Act, 1932, and trade unions under the Industrial Relations Ordinance, 1969. The right includes the right of continuance and the word "form" does not limit the right to the commencement of the association.⁴⁷ The right, however, will not include any agreement within the definition of Sections 120-A and 120-B of the Bangladesh Penal Code which define and provide punishment for criminal conspiracies. The definition is narrower than in English law. A conspiracy is an agreement to commit a crime or other act contrary to law, or to achieve a legal object by illegal means; it excludes the category of conspiracies punishable in England, which are agreements to do legal acts.

In the Industrial Relations Ordinance, 1969 a trade union has been defined as "any combination of workmen or employers formed primarily for the purpose of regulating the relations between workmen and employers or workmen and workmen or employers and employers, or for imposing restrictive conditions on the conduct of any trade or business and includes a federation of two or more trade unions."

Under clause (a) of Section 3 of the ordinance workers have been given "the right to establish and, subject only to the rules of the organisation concerned to join associations of their own choosing without previous authorisation". Similarly, clause (b) of the same section has conferred on the employers "the right to establish and, subject only to the rules of the organisation concerned to join associations of their own choosing without previous authorisation."

Though the trade unions and the employers' associations were given full freedom to draw up their constitutions and elect their representatives, they were required to respect the law of the land in exercising their rights under Section 3, namely, to organise their administration and activities and to formulate their programmes. They were also given the right to affiliate with international organisations and confederations of workers' and employers' organisations.

⁴⁷ *Row v. State of Madras*, AIR 1951 Mad 147.

In England, the right is generally enjoyed, but it is restricted to prevent activities which are illegal or considered undesirable in the public interest. The crime of conspiracy covers agreements to commit crimes, torts of fraud or malice, breaches of contract in circumstances particularly injurious to the public, and even agreements to do acts which are not illegal, e.g. to lose a race to enable a confederate to win bets, and to hiss a play unfairly.

Trade Unions are legal and enjoy some benefits and privileges. Under the Trade Disputes Act, 1906, no action lies against a Trade Union, its members, or officials in respect of any tort alleged to have been committed on behalf of the Union. Under the corresponding Bangladesh statute, this immunity is limited to torts committed in contemplation or furtherance of a trade dispute. But general strikes and lockouts aiming to paralyse the government may be declared illegal under the Trade Disputes and Trade Unions Act, 1927.

Under the same Act restrictions have been placed on the freedom of association of civil servants. This Act has been repealed by the Trade Disputes and Trade Unions Act, 1946. The effect of the latter Act has been to restore Trade Unions to their legal position as it was before 1927. The Public Order Act, 1936, makes any association illegal whose object is to usurp the functions of the police or armed forces of the Crown or to display physical force in furthering any political ends.

The Constitution of the United States does not guarantee the right to form association and even trade union activities were supposed to be illegal before the beginning of this century. In *National Labour Relations Board v. Jones*,⁴⁸ the Supreme Court of the United States extended its recognition to the trade unions since their purpose was to improve existing labour conditions. It is legal for the employees to strike and persuade others to join them, provided the strike is not actuated by malice.⁴⁹ In *Dennis v. United States*⁵⁰ the United States Supreme Court upheld the

⁴⁸ 301 US 1 (1937)

⁴⁹ *American Steel Foundries v. Central Trades Council*, 263 US 457 (1923).

⁵⁰ 341 US 494 (1951)

Smith Act which declared illegal any wilful conspiring to organize as the Communist party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the government of the United States by force and violence. Chief Justice Vinson said that the purpose of the Act was 'to protect' existing government, not from change by peaceably, lawful and constitutional means, but from change by violence, revolution and terrorism.⁵¹

In 1939 Congress made it unlawful for any federal employee 'to have membership in any political party or organisation which advocates the overthrow of our Constitutional form of government in the United States'. At present under the system of 'loyalty oaths' a person in public employment has to declare that he does not advocate, nor is a member of an organisation that advocates the overthrow of the government by force or violence. In *Garner v. Board of Public Works*⁵² the validity of an ordinance requiring such an oath was challenged before the Supreme Court of the United States which sustained the legislation.

"No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organisation engaged in such endeavour."⁵³

In two other cases⁵⁴ also the Supreme Court declared in favour of the constitutionality of the loyalty oath requirement. And though in *Wieman v. Updegraff*⁵⁵ the Supreme Court observed that the membership might be innocent and that a state servant might have joined a proscribed organisation unaware of its activities and purposes, still under the legislation impugned which required a loyalty oath of all state employees the fact of membership in an organisation on the Attorney-General's list without such knowledge disqualified the public employees.

⁵¹ *Ibid.*, at 501.

⁵² 341 US 716 (1951)

⁵³ *Ibid.*, at 724.

⁵⁴ *Gerende v. Baltimore City Board*, 341 US 56 (1951); *American Communications Association v. Douds*, 339 US 382 (1950).

⁵⁵ 344 US 183 (1952).

Apart from requiring this loyalty oath from those who enter and remain in government employment, the right of association is generally accorded to the American citizens. As a result of the Supreme Court decision in *Brown v. Board of Education*, prohibiting segregation in the schools, the State of Alabama sought to declare the National Association for Advancement of Coloured People illegal. During trial before the state courts the NAACP was ordered to produce records and papers including membership lists. The Association resisted the production order on the ground that the state could not compel disclosure of its members because the due process clause of the Fourteenth Amendment protects the freedom to engage in association for the advancement of beliefs and ideas, whether they were political or economic or religious or cultural. In holding that the immunity from state scrutiny of membership was related to the right of the members to pursue their lawful private interests privately and to associate freely with others the Supreme Court expressed the view that "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."⁵⁶

Reasonable Restrictions

The Indian Supreme Court laid down some principles applicable to the question of reasonableness of restrictions. It viewed the question whether a restriction is reasonable or not as justiciable. The respondent who was the general secretary of the People's Education Society, Madras, which was registered under the Societies Registration Act, 1860, challenged the constitutionality of the provisions of the Indian Criminal Law Amendment Act, 1908, as amended by the Madras Act 1950. The Supreme Court observed:

"The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields, that the vesting

⁵⁶ *National Association for the Advancement of Coloured People v. Alabama*, 357 US 449 (1958).

of authority in the executive government to impose restrictions on such right without allowing the grounds of such imposition, both in their factual and legal aspects to be duly tested in a judicial enquiry, is a strong element which, in our opinion, must be taken into account in judging the reasonableness of the restrictions imposed by section 15 (2) on the exercise of the fundamental right under Article 19 (1) (c); for no summary and what is bound to be a largely one-sided review by an Advisory Board, even where its verdict is binding on the executive government, can be a substitute for a judicial enquiry. The formula of subjective satisfaction of the government or of its officers, with an Advisory Board thrown in to review the materials on which the government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights.⁵⁷

This decision was considered in a case before the Dacca High Court involving the constitutionality of Section 16 of the Criminal Law Amendment Act, 1908 which was challenged as being inconsistent with the right of association guaranteed by the Constitution of Pakistan, 1962.⁵⁸ An order was passed under this section declaring the Jamaat-i-Islami, a political party, unlawful.⁵⁹ On behalf of the government it was asserted that the Jamaat was not a political party but "a religious association of Muslims who adhered to follow the principles of Islam and used to propagate the same throughout the country". Since the Jamaat had been interfering with the administration by

⁵⁷ *State of Madras v. V. G. Row*, AIR 1952 SC 196. In *Hari Chand v. Mizo District Council*, AIR 1967 SC 829, the Indian Supreme Court viewed the reasonableness or otherwise of a restriction as a justiciable concept and observed that it is for the Court to decide the question having regard to the principles laid down in *V. G. Row's* case.

⁵⁸ *Tamizuddin Ahmed v. Government of East Pakistan*, PLD 1964 Dac 795.

⁵⁹ Section 15 of the Criminal Law Amendment Act provides as follows: "(1) 'association' means any combination or body of persons, whether the same be known by any distinctive name or not; and (2) 'Unlawful association' means an association—(a) which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or (b) which has been declared to be unlawful by the Provincial Government under the powers hereby conferred."

creating disaffection and hatred in the minds of the people against the Government, particularly after the promulgation of the Muslim Family Laws Ordinance, 1963, it was necessary to make the order in the interest of public peace and tranquillity as well as the security of the country.

As to why Section 16 must be held to have imposed unreasonable restrictions the petitioner advanced four reasons, namely, (i) it confers arbitrary powers on the Provincial Government to ban an association on its own subjective satisfaction, (ii) no machinery has been provided for revision or any other mode of review of the action taken by the Government, (iii) it has made no provision for hearing the association before action is taken, and (iv) there is no period fixed for the ban, the ban being virtually absolute and permanent.

When, in spite of the provisions relating to the representation of the affected party or organisation before an Advisory Board upon whose report the Government could cancel the order if it found that there was no sufficient cause for such order, the Indian Supreme Court found that the similar provisions in the Criminal Law Amendment Act put unreasonable restrictions upon the right of association,⁶⁰ how could the impugned section, Sattar J observed, pass the test of reasonableness. As Section 16 would show, a duty was cast upon the Government to satisfy itself by making some enquiry objectively, but "the enquiry is purely for information of its own mind". In stating further reasons why the section could not be sustained, Sattar J observed:

"There is no provisions for putting down the grounds for being so satisfied as there is none for any hearing before or after making the declaration. There is absolutely no scope for challenging the notification in Court or before any other authority."

Section 16—"Power to declare association unlawful:—(1) If the Provincial Government is of opinion that any association interferes or has for its object interference with the administration of law or with the maintenance of law and order, or that it constitutes a danger to the public peace, the Provincial Government may, by notification in the official Gazette, declare such association to be unlawful."

⁶⁰ *State of Madras v. V. G. Row*, AIR 1952 SC 196.

In deciding an appeal from this as well as another case from West Pakistan which also arose on a writ petition presented by the President of Jamaat-i-Islami involving the same question, namely, whether the order declaring the Jamaat unlawful and the law under which it was passed could be held as valid and constitutional, the Supreme Court of Pakistan introduced more convincing reasons in support of the contention that the Criminal Law Amendment Act, 1908 and the action taken thereunder were void, insofar as they imposed unreasonable restrictions on the constitutional right of association.⁶¹ The Court pronounced in no uncertain terms that both the reasonableness of the law itself and the mode of application, whether such mode was prescribed by the law or not, were subject to judicial review. Since the citizen approaches the Court not only for a declaration that his freedom has been restrained under law, but also that it has been unreasonably restrained, the Court has, in order to determine the latter question, to take into consideration the circumstances of the application of the restraint. It cannot consider the expression "reasonable restrictions" exclusively in relation to the factual grounds on which the law imposing the restrictions declares that they may be imposed. In the words of Cornelius CJ,

"The only manner which the Courts themselves would regard as reasonable is that the existence of the factual grounds of the restriction should have been established in the mode which the Courts recognise as essential where a right to life or liberty or property is concerned, namely, after a proper hearing given to the person concerned."⁶²

It would be a denial of the judicial duty if the Court makes a presumption that "the authority in question has acted in accordance with justice or reason or equity" in making an order under the statute without ascertaining whether "the restrictions in themselves are consistent with justice and reason, whether the conditions for their application have in fact been established, and whether they have been employed by competent authority."⁶³

⁶¹ *Abul A'la Maudoodi v. Govt. of West Pakistan*, PLD 1964 SC 673.

⁶² *Ibid.*, at p. 708.

⁶³ *Ibid.*, at p. 708.

In determining whether the restrictions imposed on the right of association are reasonable or not regard must be had both to the procedural as well as the substantive parts.⁶⁴ Thus, while repudiating the view that if the Court is satisfied that the restriction has been imposed in the interest of the general public, it must decline to inquire whether the manner in which the restriction is likely to be imposed by the officer concerned has been reasonable or not, S. A. Rahman J said that

“Although per se restrictions imposed by a statute on a fundamental right may sound reasonable, yet the method of imposition of the restrictions may be so arbitrary that their reasonableness may become illusory.”⁶⁵

A restriction which amounts to “a complete denial or total prohibition of the right for all times to come or for an indefinite period” cannot be reasonable. The extent of encroachment upon the right is a relevant factor in deciding upon reasonableness. A total prohibition may in certain circumstances be considered as reasonable if “it is for a limited period or to meet a specific well-defined mischief.”⁶⁶ A prior hearing is not the sine qua non “of the reasonableness of any action taken for restricting a fundamental right”. For, as observed by Hamoodur Rahman J, as he then was, “it may well be that to insist upon such a prior right of hearing would be to render the power itself futile, although it may be essential in the interest of the public or the State to take such action in the face of imminent danger or immediate apprehension of the breach of peace.”⁶⁷

There can be no hard and fast rule for determining the matters which may be considered for testing the reasonableness of the

⁶⁴ *Ibid.*, at p. 733; *Express Newspapers (Private) Ltd., v. The Union*, AIR 1958 SC 578; *Bazal Ahmad v. Govt. of West Pakistan*, PLD 1957 Lah 388; *Rao Mahroz Akhtar v. D. M.* PLD 1957 Lah 676; *The Progress of Pakistan Co. Ltd. v. Registrar*, PLD 1958 Lah 887.

⁶⁵ *Ibid.*, at p. 733.

⁶⁶ *Ibid.*, at p. 788.

⁶⁷ *Ibid.*, at p. 788.

restriction, for, "there can be no general standard of reasonableness applicable to all cases". In the opinion of Hamoodur Rahman J,

"It will certainly depend upon the nature of the right sought to be restricted, the nature and extent of the restrictions sought to be imposed, the nature of the circumstances in which the restriction is to be imposed, the evil sought to be prevented or remedied, the necessity of urgency of the action proposed to be taken and the nature of the safeguards, if any, provided to prevent possibilities of abuse of power."⁶⁸

A law which required a certain percentage of workers forming the membership of a union to represent the workers as a class could not be said to have infringed the right to form association, since it did not prevent the other unions or workers from forming a union and enrolling the required percentage so as to acquire the exclusive right of representation.⁶⁹ The right to form association or unions guaranteed by Article 38 does not imply the exercise of such right on the properties belonging to others.⁷⁰ A direction prohibiting the holding of meetings by the railway workers in the railway premises did not infringe the right to form unions, because the exercise of this right in the aforesaid circumstances meant the negation of the right of someone else to hold his property. The Constitutional guarantee under Article 38 cannot be invoked in support of an attempt to fulfil every object of an association.⁷¹

The Democratic Freedoms and Personal Liberty

If any citizen is lawfully deprived of his liberty, he will not be allowed to say that he has been deprived of any of the liberties

⁶⁸ *Ibid.*, at p. 788; in this case reference was made to *State of Madras v. V.G. Row*, AIR 1952 SC 196.

⁶⁹ *Raja Kulkarni v. State of Bombay*, AIR 1954 SC 73.

⁷⁰ *Railway Board v. Niranjan Sing*, AIR 1969 SC 966. The First Amendment to the U. S. Constitution does not guarantee the general right to use other people's or government's property for the purpose of holding meeting and delivering speeches unless the owner of the property give consent, *Brown v. Louisiana*, 383 US 131 (1961).

⁷¹ *All India Bank Employees' Association v. National Industrial Tribunal*, AIR 1962 SC 171.

guaranteed to him by Articles 36 to 40 and the first part of Article 42 of the Constitution of Bangladesh. These liberties can be enjoyed by him subject to the limitations mentioned in the Articles so long as he does not lose his personal liberty. In *Gopalan v. State of Madras*⁷² Patanjali Sastri J clearly brings out the relationship between Article 19 and Articles 20-22 of the Indian Constitution (corresponding to Articles 36 to 40, the first part of Article 42, and Articles 32, 33 and 35 respectively of the Constitution of Bangladesh).

“Read as a whole and viewed in its setting among the group of the provisions (Articles 19-22) relating to “Right of Freedom”, Article 19 presupposes that the citizen to whom the possession of these fundamental rights is secured retains the substratum of personal freedom on which alone the enjoyment of these rights necessarily rests. But where, as a penalty for committing a crime or otherwise, the citizen is lawfully deprived of his freedom, there could no longer be any question of his exercising or enforcing the rights referred to in Clause (1). Deprivation of personal liberty in such a situation is not within the purview of Article 19 at all but is dealt with by the succeeding Articles 20 and 21. In other words, Article 19 guarantees to the citizens the enjoyment of certain civil liberties, while they are free, while Articles 20-22 secure to all persons, citizens or non-citizens, certain constitutional guarantees in regard to punishment and prevention of crime.”

Dealing with the same problem, Das J of the Indian Supreme Court said:

“The freedom of the person is not the result of Article 19. Article 19 only deals with certain particular rights which, in their origin and inception, are regarded as specific and independent rights. It does not deal with the freedom of the person as such. Article 19 (1) (d) protects a specific aspect of the right of free locomotion, namely the right to move freely throughout the territory of India which is regarded as a special privilege or right of an Indian citizen and is protected as such. The protection of Article 19 is co-terminus with the legal capacity of a citizen to exercise the rights protected thereby, for sub-clauses (a) to (e) and (g) of Article 19 (1) postulate the freedom of the person which alone can ensure the capacity to exercise the rights protected by these sub-clauses. A citizen who loses the freedom of his person by being lawfully detained, whether as a result of a conviction for an offence or as a result of preventive detention loses his

capacity to exercise those rights and therefore has none of the rights which sub-clauses (a) to (e) and (g) may protect.”⁷³

It follows that, if a penal law deprives a citizen of his personal liberty, he cannot, as a matter of course, impugn the law as repugnant to Articles 36 to 40 and the first part of Article 42 of the Constitution of Bangladesh. If, however, the object of the law is to restrict any of the rights guaranteed in those Articles, he is entitled to be heard on the question whether the law is within the constitutionally permitted restriction on that right. A law punishing theft or causing bodily injury with imprisonment is not liable to be impugned as a restriction on the right of free movement or residence, but a law punishing the publication of proscribed matter may be liable to avoidance as an unreasonable restriction on the right of free speech.

No decision in Bangladesh has yet determined whether the deprivation of liberty under Article 32 of the Constitution of Bangladesh has any effect on a citizen's right guaranteed by Articles 36 to 40 and the first part of Article 42, or in other words, whether a citizen imprisoned as a result of a conviction by a Court of law, or an order under preventive detention laws can still claim the benefits of the individual liberties conferred by Articles 36 to 40 and the first part of Article 42 of the Constitution of Bangladesh.

Among the democratic freedoms other than those discussed in this chapter, due to their importance, two separate chapters, Chapters VII and VIII have been devoted to discuss the scope and extent of the freedom of speech and expression and the freedom of religion respectively. Since the freedom to follow any lawful profession or conduct any lawful business and the right to acquire, hold, transfer or otherwise dispose of property relate to property rights they have been included in Chapter X which deals with Rights to Property.

CHAPTER SEVEN

FREEDOM OF EXPRESSION AND OF THE PRESS

The Doctrine of Free Speech

Clause (1) of Article 39 guarantees freedom of thought and conscience. The freedom of thought and conscience must necessarily include the right to express opinions, for, as has been said, 'nobody who has urged the necessity of the freedom of thought can have seriously meant anything by that phrase but the expression of free thought by some public manifestation.'¹ There may be various forms of expression which may not be confined only to speech or writing. Clause (2) of Article 39 guarantees to every citizen the right to freedom of speech and expression. It may be regarded as one of the substantive liberties protected by the Constitution. Freedom of the press is also guaranteed by this clause.

The guarantee of free speech has not given him absolute protection in the matter of self-assertion. Parliament can impose reasonable restrictions to ensure other community interests, such as the security of Bangladesh, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. Restrictions which do not relate to any of the objects mentioned in this clause would seem unconstitutional.² But the physical consequences which may arise from them, such as trespass,

¹ Geoffrey Marshall, *Constitutional Theory*, at p. 170 (1971).

² *Mahmud Zaman v. D. M.*, Lahore, PLD 1958 Lah 651. In *Zebunnissa v. Pakistan*, PLD 1958 SC 35, Munir CJ observed that "neither the legislature nor the Government could impose any restriction on the freedom of speech or expression except for the purposes mentioned in Article 8" of the Constitution of Pakistan, 1956, corresponding to Article 39.

obstruction or the breach of the peace, may attract their imposition. The exceptions made in favour of the above mentioned objects all of which involve speech, though they may also involve action, require some detailed consideration.

Apart from the comparatively recent pronouncements on the value of free expression to which reference will presently be made, mention may also be made of the Declaration of the Rights of Man³ and the French Constitution of 1791 which contains proclamations of the freedom of discussion and the liberty of the press.

The right to free expression comes next only to rights to life and liberty. Freedom of expression has been considered to be inseparable from the right to personal liberty. Cardozo J of the United States Supreme Court says that freedom of expression is "the matrix, the indispensable condition, of nearly every other form of freedom".⁴ Mr. Justice Douglas stated:

"Full and free discussion has indeed been the first article of our faith....We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world."⁵

One of the best theoretical exponents of free speech is of the opinion that free discussion has been compared to a better ally of truth than falsehood.⁶ Freedom of expression serves as an outlet for resentments and hostilities that otherwise may seek more dangerous expression.⁷

³ "No one should be called to account for his opinions so long as their manifestation does not upset public order as established by law",— Declaration of the Rights of Man, 1789.

⁴ *Palko v. Connecticut*, 302 US 319, 327 (1937).

⁵ *Dennis v. U. S.*, 341 US 494, 584 (1951).

⁶ John Stuart Mill, *On Liberty in Utilitarianism Liberty and Representative Government*, 118-19 (Everyman edition, 1950). Also Chafee, *Free Speech in the United States*, 1948; *Thirty-five Years with Freedom of Speech*, 1952.

⁷ Brandeis J concurring in *Whitney v. California*, 274 U. S. 357 (1927). He further said: "The power of the Courts to strike down an offending law is no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly."

In England, as is popularly known, the courts give effect to the right to say and write whatever one pleases provided that no failure of legal duty results but in the opinion of Dicey this notion, though it may be justified to some extent, is essentially false. It

“conceals from students the real attitude of English law towards what is called ‘freedom of thought’, and is more accurately described as the ‘right to the free expression of opinion’. As every lawyer knows, the phrases ‘freedom of discussion’ or ‘liberty of the press’ are rarely found in any part of the statute book nor among the maxims of the common law. As terms of art they are indeed quite unknown to our courts. At no time has there in England been any proclamation of the right to liberty of thought or to freedom of speech.”⁸

But, what he says immediately after these words on the law of libel more truly brings out the reasons for ensuring the freedom of the Press:

“Press is the mouthpiece of the public opinion. Its free functioning is more important now when the country has become free than it was before. It has to work as a link between the Parliament which frames legislation and the public which express their hopes and aspirations through it.”⁹

Freedom of the Press

Freedom of the Press includes the freedom of the radio, the television and the movies which are, therefore, entitled to seek the protection guaranteed by the Constitution. Assertions have been made that freedom of the press exists only when there is no prior restraint on publication. The necessity of a free press in a democratic state can hardly be over emphasised.

Even though freedom of the press was not specifically mentioned in Article 8 of the Constitution of Pakistan, 1956 it was considered to be included under the guarantee regarding the freedom of speech and expression. Muhammad Shafi J in

⁸ Dicey, *Law of the Constitution*, at pp 239-240 (1964).

⁹ *Muhammad Muzaffar Khan v. The State*, PLD 1959 Pesh 77.

interpreting the scope of that Article, stressed the justification for the existence of an independent Press in these words:

"The purpose of the Constitution is that there should be as few restrictions on the freedom of the Press as in the light of the conditions prevailing in a country are absolutely essential. In fact, no restriction should be placed on the freedom of the Press except in times of grave emergencies, such as war, civil commotion on a large scale, and even then only in respect of matters involving the security of the State."

Some statement made by Blackstone about the most important of the above-mentioned vehicles of expression, that is, the press, requires consideration:-

"The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restrictions upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleased before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, and illegal, he must take the consequences of his own temerity.....To punish (as the law does at present) any dangerous or offensive writings, which when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty."¹⁰

¹⁰ 4 *Commentaries*, 151 (8176). One of the best arguments in favour of maintaining freedom of the press comes not from any politician or a lawyer or a judge but from a poet who went to the root of the problem and made a penetrating observation: "books are not absolutely dead things, but do contain a potency of life in them to be as active as that soul was whose progeny they are; nay they do preserve as in a vial the purest efficiency and extraction of that living intellect that bred them. I know they are as lively, and as vigorously productive as those fabulous dragons' teeth; and being sown up and down, may chance to spring up armed men. And yet on the other hand unless wariness be used, as good almost kill a man as kill a good book; who kills a man kills a reasonable creature, god's image; but he who destroys a good book, kills reason itself, kills image of God, as it were in the eye. Many a man lives a burden to the earth, but a good book is the precious life-blood of a master spirit, embalmed and treasured up on purpose to a life beyond life...whereof the execution ends not in the slaying of an elemental life, but strikes at that ethereal and fifth essence, the breath of reason itself, slays an immortality rather than life itself," John Milton, *Areopagitica*.

These words are, no doubt, to be valued but the question remains still to be answered as to how the power of a licenser can be regulated by law if censorship must not be dispensed with for the sake of peace, order, good government and religion. For, censorship, though may be subjected to well-defined principles, would in the long run mean interference by a single person of the rights of other persons to make manifest their own thoughts.

Limitations on the Freedom of Speech and Expression

Freedom of speech and publications is protected by the American Constitution unless such speech or publications present "a clear and present danger of action of a kind the state is empowered to prevent and punish".¹¹ Mr. Justice Holmes of the American Supreme Court declared that "the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic".¹² In delivering the Supreme Court opinion in the same case he brought out the ethics behind the necessity for curbing unqualified free speech and attempted to make the terms of the First Amendment more precise and specific:

¹¹ *Board of Education v. Barnette*, 319 US 624 (1943). Here the saluting of flags which, of course, are not words, was looked upon as interference with the freedom of expression and religion. Similarly, in *Street v. New York*, 394 US 576 (1968) it was held that the Constitution protected the public expression of defiant opinion about the flag which finds expression in its burning.

In *Stromberg v. California*, 283 US 359 (1931), while declaring a California statute which made it unlawful to display a red flag or any flag "as a sign, symbol or emblem of opposition to organised government" invalid, Chief Justice Hughes said: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

¹² *Schenck v. U. S.*, 249 US at p. 51 (1919)

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."¹³

Speaking on the Holmesian test Mr. Brandeis said that it "is a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities and from abuse by irresponsible, fanatical minorities."¹⁴

The 'clear and present danger' test enunciated by Mr. Justice Holmes in order to determine whether a legislative restriction upon freedom of speech is constitutional was applied by the American Supreme Court in a case¹⁵ where eleven of the principal leaders of the American Communist party were put on trial. In this case Chief Justice Vinson remarked "we are squarely presented with the application of the 'clear and present danger' test, and must decide what the phrase imparts". In answering the question when does a conspiracy become a "present danger" the Chief Justice said that:

"The validity of restrictions upon advocacy of violent revolution did not depend upon the immediacy of revolt resulting from such advocacy. Obviously, the words cannot mean that before the government may act, it must wait until the push is about to be executed, the plans have been laid and the signal is awaited. If government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required. The argument that there is no need for government to concern itself, for government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly

¹³ *Ibid.* The Supreme Court declined to follow this test in *Gitlow v. New-York*, 268 US (1925) but though *Gitlow's* case was not overrated the Court has subsequently followed the clear and present danger, *Herndon v. Lowry*, 301 US 242 (1937).

¹⁴ *Schaefer v. United States*, 251 US 466 at 482 (1920).

¹⁵ *Dennis v. U. S.*, 341 US 494 (1951). The judges of the American Supreme Court, however, hold different views on matters concerning the force and much of the 'clear and present danger' doctrine.

an attempt to overthrow the government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent.”¹⁶

The dissenting view of Mr. Justice Douglas, however, requires consideration. He emphatically asserted :

“Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party... How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery.”¹⁷

He expressed more clearly in favour of abandoning this formula :

“I see no place in the regime of the First Amendment for any clear and present danger test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it”

He had great misgivings about the test because it was “so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.”¹⁸

The ‘clear and present danger’ formula has nonetheless remained as a limitation on the powers of the legislature to counteract what may seem to it as serious evil. Thus, in saying

¹⁶ *Ibid.*, at 509.

¹⁷ *Ibid.*, at 588. In *Pennekamp v. Florida*, 328 US 331 (1946), Mr. Justice Frankfurter has doubted whether Mr. Justice Holmes by using the doctrine of clear and present danger, evolved a technical legal doctrine or conveyed “a formula for adjudicating cases.”

¹⁸ *Brandenburg v. Ohio*, 395 US 444 at 454 (1968). In commenting upon the inadequacy of the “clear and present danger” test a distinguished English writer said: “An obvious feature of this formula is that, on its face, it goes no way at all towards stating the circumstances under which the legislature may regulate speech. It does not even say that Congress may act to prevent any clear and present danger, but only that it may prevent a clear and present danger of the kind that it has a right to prevent. The kinds of danger that Congress does have a right to prevent are left entirely unclear. In fact the words ‘clear’ and ‘present’ seem simply ways of stating the obviously necessary requirement that the dangers in question must be identifiable and not remote or improbable, and they fail to say what dangers may be so identified as plausible, immediate and serious.” Geoffrey Marshall, *Constitutional Theory*, at p. 177 (1971).

that though the freedom of speech was not absolute,¹⁹ Mr. Justice Douglas asserted that it is nevertheless protected against censorship, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.²⁰ In his opinion "there is no room under our Constitution for a more restrictive view. For the alternative would lead to standardisation of ideas either by legislatures, courts, or dominant political or community groups."²¹

In 1961, the U. S. Supreme Court, in upholding the constitutionality of the membership provision in the Smith Act, interpreted it as acquiring proof of active as distinguished from merely nominal or passive membership in the Communist Party.²²

In another case²³ decided in the same year the Court reversed the conviction of the appellant under the membership provision of the Act on the ground that the evidence was insufficient to show that the Communist party of which the appellant was a member was advocating the doctrine of forcible overthrow of the government or action leading to that end. In reiterating the views expressed in an earlier case²⁴ the Supreme Court stated that the most that can be said about the evidence relating to "industrial concentration" programme of the party was that it

"might justify an inference that the leadership of the party was preparing the way for a situation in which future acts of sabotage were presently advocated; and it is *present* advocacy, and not an intent to advocate in the future or a conspiracy to advocate in the future once a ground work had been laid, which is an element of the crime under the membership clause."

¹⁹ *Chaplinsky v. New Hampshire*, 315 US at p. 571 (1942)

²⁰ *Terminiello v. Chicago*, 337 US at p. 4 (1948) This formula that the evil sought to be controlled must rise "far above public inconvenience, annoyance or unrest" so as to almost resemble an overt act which is punishable as an offence was approved in *Edwards v. South Caroliana*, 372 US 229 at 237 (1963).

²¹ *Ibid.*, at p. 4.

²² *Scales v. U. S.*, 367 US 203 (1961).

²³ *Noto v. U. S.*, 367 US 290 (1961).

²⁴ *Yates v. U. S.*, 354 US 298 (1957). In his dissenting opinion, Mr. Justice Black said: "I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal."

Pre-Censorship

An order under Section 7(1) of the Press (Emergency Powers) Act, 1931 calling upon the printer and publisher of a newspaper to deposit security was held unconstitutional since it aimed to restrain him from expressing himself freely before he actually expressed himself.²⁵ In the words of Kayani CJ, "whatever restraint is to be placed on him, will naturally relate to the manner of his expression. If he is required to fulfil a condition before actually expressing himself, the restraint will be of a preventive nature....."²⁶

In a case before the Madras High Court where Section 49-A of the Madras City Police Act, 1886, in regard to publication for sale of any book or pamphlet containing news or information of horse races empowered the executive authority under its rule-making power to permit such publication or to refuse it, the Court held that it amounted to a previous restraint on the exercise of the freedom of expression and was illegal.

"Pre-censorship of news by the executive authority is not consistent with the exercise of the fundamental right to freedom of speech and expression guaranteed by the Constitution."²⁷

²⁵ *Mahmud Zaman v. D. M., Lahore*, PLD 1958 Lah 651. The Press (Emergency Powers) Act, 1931, provides for a security upto Taka 1000 being demanded of printers and publishers. A provincial government may forfeit the deposit if a book or newspaper incites its readers to commit cognizable offences or is seditious, or promotes communal ill-feeling, or encourages defiance of law or non-payment of taxes, or prejudices recruitment to the armed forces or seduces military personnel from their allegiance. The same penalty may be exacted when the published document causes fear or annoyance to any person with intent to compel him to do something he is not legally bound to do. Though the order of forfeiture is passed on the subjective satisfaction of the Minister concerned the printer or publisher has a right to petition the High Court to set aside the order of forfeiture, and it will be heard by a bench of three judges. No newspaper may be published before the printer and publisher have made statutory declarations under the Press (Registration) Act, 1867. If this provision is violated the press may be seized, and any person concerned in the publication, distribution or sale of the newspaper may be punished with imprisonment.

²⁶ *Ibid.*

²⁷ *In Re Venugopal*, AIR 1954 Mad 901.

The reason for which pre-censorship should be condemned as unconstitutional were advanced by Chief Justice Hughes of the United States Supreme Court.²⁸ Minnesota enacted a statute under which the owners and publishers could be enjoined from publishing any newspaper or magazine if it contained any "malicious, scandalous and defamatory matter." A paper called "The Saturday Press" was condemned under the statute. The Supreme Court set the injunction aside because the statute imposed a previous restraint on publication, a device resorted to in colonial days to suppress criticism and stifle opposition. Civil or criminal action may be taken if the publisher or press keeper commits any crime or unless anything defamatory does any wrong, but a paper cannot be suppressed because it is irresponsible or reckless or imprudent.

"While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavouring faithfully to discharge official duties exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy consistent with constitutional privilege."²⁹

- ²⁸ *Near v. Minnesota*, 283 US 697 (1931). In *Lovell v. Griffin*, 303 US 444 (1938), the US Supreme Court condemned an ordinance that required prior permission to distribute publications as unconstitutional. Similarly an official practice requiring a license for use of a public park for meeting was in the absence of reasonable and definite standard to guide the officials, held as unconstitutional in *Niemotkov. Maryland* 340 US 268 (1951). Liberty of the press embraces pamphlets and leaflets.
- ²⁹ *Ibid.*, at p. 719-720. In *Kingsley Books, Inc. v. Brown*, 354 US 436 (1957), Mr. Justice Frankfurter pointed out that this case laid down "the protection even as to previous restraint is not absolutely unlimited."

In that they influence public opinion, motion pictures, radio and television can also claim the protection of Article 39. Where a New York statute gave a censor the right to prevent the exhibition of a motion picture on the ground that it was sacrilegious, it was held that the statute was unconstitutional; thus bringing the motion pictures within the ambit of the constitutional guarantees of freedom of speech and of the press. Clark J observed: "The Censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor."³⁰

In *Superior Films Incorporation v. Department of Education*,³¹ it was stated that the First Amendment guarantees are violated when a state vested in a state official the power to refuse a license, required by state law for exhibition of a motion picture on the ground that it was "'harmful' 'immoral' or would tend to corrupt morals." Mr. Justice Douglas stated that any prior restraint of the exhibition of motion pictures was unconstitutional and that protection against prior restraint accrued to the spoken word as well as to the written: "The First and the Fourteenth Amendments say that the Congress and the States shall make 'no law' which abridges freedom of speech or of the press." In order to sanction a system of censorship I would have to say that "no law is qualified to mean 'some laws'. I cannot take that step".

³⁰ *Joseph Burstyn Inc. v. Wilson*, 343 US 495 (1952). In *Kingsley International Pictures Corporation v. Regents etc.*, 360 US 684 (1959), the U.S. Supreme Court held the ban imposed by a New York statute on the film "Lady Chatterley's Lover" as unconstitutional. An ordinance which was assailed on the ground that in requiring the submission of moving pictures to a censor before a public showing it constituted a prior restraint was upheld in *Times Film Corporation v. Chicago*, 365 US 43 (1961). The judgment of conviction of a manager of a theatre which showed the French film *Les Amants* (The Lovers) was reversed in *Jacobellis v. Ohio*, 378 US 184 (1964). To meet the constitutional test a statute containing rules of movie censorship must provide a few procedural safeguards: (1) the censoring agency and not the exhibitor must have the burden of instituting judicial proceeding, (2) any restraint prior to judicial review must be for a brief period to preserve the *status quo*, and (3) there must be assurance of prompt judicial determination, *Freedman v. Maryland*, 380 US 51 (1965).

³¹ 346 US 587 (1954).

In the United States of America the postal officials are authorised to prevent the delivery of literature or letters sent to obtain money by fraud. But the courts have never upheld any form of censorship in this field. It is beyond the power of the Postmaster-General to deny the special rates of second class mail to a magazine on the ground that it seemed to him to have contained writings and pictures which were indecent, vulgar and risqué.

"A requirement that literature as art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic values implicit in the requirements of the Fourth Condition can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values."³²

In Bangladesh, under Section 26 of the Post Office Act, 1898, the government or an authorised officer may, in emergencies, in the interest of public safety or tranquillity, direct any postal packet to be detained and disposed of as directed.

On the refusal by the Deputy Commissioner of Lahore to issue a licence for the use of loudspeakers at a political meeting, as required under Section 2 of the West Pakistan Use of Loudspeakers (Prohibition) Ordinance, 1963 a writ petition was moved before the Lahore High Court challenging the constitutionality of the provisions of the aforesaid section on the ground that they, by empowering the authority concerned to put a previous restraint on the right of free speech guaranteed by the Constitution³³ placed unreasonable restrictions on such rights.³⁴

³² *Hannegan v. Esquire*, 346 US 587 (1954).

³³ Fundamental Right No. 9, *Constitution of Pakistan*, 1962.

³⁴ Section 2 of the Ordinance—"No person shall use or cause to be used a loudspeaker in a public place for any purpose except with the permission of the Deputy Commissioner, and subject to such terms and conditions as the Deputy Commissioner may impose:

Provided that the prohibition shall not apply to the use of a loudspeaker for the purpose of 'Azan'.

Explanation—For the purposes of this section 'public place means any place to which the members of the public have access with or without invitation."

Though the use of loudspeakers finds no mention in the fundamental right guaranteeing freedom of speech it was considered indispensable for effective public speaking:

“No argument is needed to prove that in modern times, with the vast growth of population, it is not possible, without the aid of loudspeakers, to make the native voice heard in public meeting by the persons who assemble to hear it. For the purpose of expression of views on public, religious or social matters and the development and improvement of society, or matters calculated to reform its systems, both governmental and sociological, the holding of public meetings is the birthright of the people in free democratic State like ours.”³⁵

S. A. Mahmood J considered a number of cases decided by the American Supreme Court relating to freedom of speech which left no doubt that any prior restraint not only interfered with the petitioner’s right to express himself and communicate his views and ideas to others, but in exercising the power the authority acted arbitrarily. He said:

“The section is also capable of being used discriminately, as the Deputy Commissioner may grant permission to one person or party and refuse to another, there being no guiding principles laid down by the Legislature, no check and no objective standard or control on the exercise of the power.”³⁶

While referring to the use of streets and parks, whoever may have title to them, for purposes of assembly, communicating thoughts and discussing public questions, he further observed:

“Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised

³⁵ *Khwaja Muhammad Safdar v. Province of West Pakistan*, PLD 1964 Lah 718; here, reference was made to a case decided by the American Supreme Court, *Saia v. New York*, 334 US 558 (1948).

³⁶ *Ibid.*, at p. 725. As Chief Justice Vinson said: “New York cannot vest restraining control over the right to speak on religious subject in an administrative official where there are no appropriate standards to guide his action.” *Kunz v. New York*, 340 US 290 (1951).

in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not in the guise of regulation, be abridged or denied.”³⁷

Since the denial of permission to use a loudspeaker which is “a necessary accompaniment of public speaking and indispensable instrument of effective public speech”, means a denial of the right to communicate one’s views and thoughts even to those who want to hear them, the Court held the provisions of Section 2 as violative of the fundamental right guaranteeing freedom of speech and expression.

The demand of a state law requiring a labour organiser to get a license to address a public meeting of workers was refused a constitutional recognition by the United States Supreme Court in *Thomas v. Collins*.³⁸ “These rights of assembly and discussion are protected by the First Amendment. Whatever would restrict them, without sufficient occasion would infringe its safeguards.... The speech was an essential part of the occasion unless all meaning and purpose were to be taken from it.”³⁹

Judging from these points of view whether Section 144 of the Code of Criminal Procedure would pass the test of constitutionality in a court of law in Bangladesh is yet to be seen. Under this section a magistrate may issue an order directing any person to refrain from doing certain specified acts, for example, making a political speech or holding a public meeting. It has been common experience that a magistrate had prevented the holding of public meetings for several months. As a matter of fact the Allahabad High Court held that to the extent that Section 144 permitted restrictions in excess of those permitted by Article 19(2), (3), corresponding to Article 39 of the Constitution of Bangladesh, it was void. But then the Court was of the opinion that the section contained several independent provisions which were severable from one another and as such the void provision could not be said to have affected the validity of the valid provisions.⁴⁰

³⁷ *Ibid.*, at p. 723; *Frank Hague v. Committee for Industrial Organisation*, 307 US 496 (1939).

³⁸ 323 US 516 (1945).

³⁹ *Ibid.*, at p. 534.

⁴⁰ *Raj Narain v. D. M.*, AIR 1956 All 481.

Freedom of Circulation

Freedom of expression includes the freedom of publication as well as distribution. There can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is secured by freedom of circulation. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."⁴¹

If the taxes imposed on a publisher show an invidious incidence, they may be declared unconstitutional as having the effect of stifling circulation of books or papers disseminating knowledge. In 1712, the British Parliament imposed a tax on printed papers and pamphlets and required a stamp to be affixed on a newspaper. Such taxes were known as "taxes on knowledge". A tax of 2 per cent was imposed on the gross receipts from advertisement in a newspaper having a circulation of 20,000 copies per week. In the opinion of the Supreme Court, the tax here involved is bad, not because it takes money from the pockets of the appellees.

"If that were all, a wholly different question would be presented. It is bad because, in the light of its history, and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."⁴²

Constitutional Restrictions on the Freedom of Expression

The Constitution does not indicate what restrictions are to be considered reasonable with regard to matters mentioned in Article 39 and, it is for the Courts to decide whether or not a restriction which is impugned is reasonable or not.⁴³

⁴¹ *Ex parte Jackson*, 96 US 727 (1877); "The principle of a free press covers distribution as well as publication," *Winters v. New York*, 333 US 507 (1948).

⁴² *Grosjean v. American Press Company*, 297 US 233 (1936). This case was followed in *Fillet v. McCormick*, 321 US 573 (1944) in which imposition of tax was prohibited on exercise of religion.

⁴³ *State v. Abdul Ghaffar Khan*, PLD 1957 Lah 142.

The test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases:

“The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgement in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.”⁴⁴

The right to determine the reasonableness of the restriction vests in the Court and it requires no mention that “there can be no absolute test of reasonableness which would be applicable to all circumstances.”⁴⁵

Where the extent of the restriction is left to the discretion of an executive authority, it amounts to negation of the right to freedom of speech and expression.⁴⁶ Demanding security from a person who disseminates or attempts to disseminate or abets the dissemination of seditious matter is provided for under Section 108 of the Code of Criminal Procedure and this was held to be imposing reasonable restrictions in the interests of the security of the State.⁴⁷

The right to free speech and expression guaranteed to every citizen by Article 39 is, as already mentioned, not absolute. Restrictions that are supposed to be good for the community may be imposed to override the right of the individual. And such

⁴⁴ *State of Madras v. V. G. Row*, AIR 1952 SC 196.

⁴⁵ *Tafazzal Hossain v. Govt. of East Pakistan*, PLD 1965 Dac 68.

⁴⁶ *In Re Venugopal*, AIR 1954 Mad 901.

⁴⁷ *Balroop v. U. P.*, AIR 1956 All 270.

restrictions will not be considered to be unreasonable.⁴⁸ Vague or uncertain restrictions are not reasonable because the citizen does not know the scope of the restriction and the inevitable result is either to take away the right altogether or render it impossible of compliance.⁴⁹ A restriction imposed on a guaranteed right cannot be reasonable if it is arbitrary, or in excess of what is required in the interest of the public and on this view, Section 144 of the Code of Criminal Procedure was held not to conflict with Article 19(1) (a) of the Indian Constitution, corresponding to Article 39 of the Bangladesh Constitution.⁵⁰ Reasonableness is required not only in the substantive provisions of the impugned law, but also in the procedural provisions.⁵¹ Applying this test, although no objection could be taken to the substantive provisions of the Dramatic Performances Act (XIX of 1876), its procedural part imposed unreasonable restrictions on the right of freedom of speech and expression as it denied the petitioner the right to be heard before final condemnation of the right to have the order reviewed by a higher tribunal.⁵²

In a case where the respondent made some remarks in a petition before a subordinate judge about the conduct of a High Court Judge it was observed that the contention that no proceedings would be taken against the respondent because of Article 8, corresponding to Article 39 of the Constitution of Bangladesh, was based on a misreading of the Article, for it is mentioned in clear terms that it would not affect any law which placed reasonable restrictions on the liberty of speech and expression.

"The harm done by allowing aspersions to be cast on judges will be so great that no reasonable person can doubt that the law of contempt of court in force in Pakistan places no more than reasonable restrictions on the liberty of speech and expression guaranteed to citizens of Pakistan."⁵³

⁴⁸ *State v. Babulal*, AIR 1956 All 571.

⁴⁹ *Krishna v. Chief Superintendent*, AIR 1955 Cal 76.

⁵⁰ *State v. Misra*, AIR 1954 All 738.

⁵¹ *N. B. Khare v. Delhi*, AIR 1950 SC 211.

⁵² *State v. Babulal*, AIR 1956 All 571.

⁵³ *State v. Abdur Rahman*, PLD 1957 Bag. Jad. 6.

Restrictions in the Interest of Security of Bangladesh

A democratic state cannot embark upon a foolproof internal security programme. This can be obtained only in a state under dictatorship.⁵⁴

Security and liberty are the *sine qua non* for the proper functioning of any democratic state. But, as has been aptly said, "security and liberty, in their pure form are antagonistic poles. The one pole represents the interest of politically organised society in its own self-preservation. The other represents the interest of the individual in being afforded the maximum right of self-assertion, free from governmental and other interference."⁵⁵

However desirable it may seem to be, absolute protection cannot be extended to either of them. For, as has been said, "absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules."⁵⁶

Every state has the paramount duty to protect its citizens from hostile activities of other states. But the power to subordinate the interest of the individual in the performance of this duty is limited. Self-expression is no less important than self-preservation. Instead of upholding the one to the prejudice of the other, the more satisfactory solution seems to be to strike a proper balance between the claims of liberty and those of security. "The demands of liberty in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests...than by announcing dogmas too inflexible for the non-Euclidean problems to be solved."⁵⁷

However, the task of balancing the conflicting claims of security and liberty is bound to be a delicate one, and since the elected representatives of the people have been entrusted with

54 "The problem like all those with which we are concerned is one of balance; too little liberty brings stagnation and too much brings chaos." Bertrand Russell in *Authority and the Individual*.

55 Schwartz, *American Constitutional Law*, p. 240. In *Cox v. Louisiana*, 379 US 536 (1965), Mr. Justice Goldberg said, "Liberty can only be exercised in a system of law which safeguards order."

56 Frankfurter J in *Dennis v. U. S.* 341 US 494 at 524 (1951).

57 *Ibid.*, at 529.

striking the proper balance, can it be said that restraints on free speech imposed by them must always be upheld, because they may be shown to have "rational basis in legislative beliefs or that a temporary majority believes such restraints to be reasonable."⁵⁸ Most laws suppressing free speech may, as an author has observed in relation to the First Amendment, have "a rational basis, in the sense that some rational men may believe their enforcement would do good", but it can equally be asserted that "the suppression of free speech seems quite evidently rational to all but a small fraction of humanity".⁵⁹

In the United States the Congress passed the Alien and Sedition Laws in 1798. Examples of cases under these laws would seem to evoke laughter. "A new Jersey editor was fined \$100 for hoping in print that the wad of a cannon fired in a presidential salute might hit President Adams on the seat of the pants." A Vermont Jeffersonian, who accused the President of "unbounded thirst for ridiculous pomp, foolish adulations, and a selfish avarice received a thousand dollar fine and four months in jail."⁶⁰

More than one hundred years after enacting the Alien and Sedition Laws the United States Congress enacted the Espionage and Sedition Acts during the First World War. These laws put restrictions on the right of free discussion. The following remarks summarise the nature of cases under the Espionage Act of 1917:

"It became criminal to advocate heavier taxation instead of bond issues, to state that conscription was unconstitutional, though the Supreme Court had not yet held it valid, to say that the sinking of merchant vessels was legal, to say that a referendum should have preceded our declaration of war, to say that war was contrary to the teachings of Christ. Men have been punished for criticizing the Red Cross and the Y. M. C. A., while under the Minnesota Espionage Act it has been held a crime to discourage women from knitting by the remarks "No soldier ever sees these socks."⁶¹

⁵⁸ Geoffrey Marshall, *Constitutional Theory*, at p. 175 (1971).

⁵⁹ *Ibid.*; quoted from Charles L. Black Jr., *The People and the Court*, at p. 221.

⁶⁰ Quoted by Schwartz in *American Constitutional Law*, at p. 243.

⁶¹ *Ibid.*, at p. 245.

In England sedition is a common law offence.⁶² In the United Kingdom, courts have held that sedition involves a further element, namely, the intention to excite violence, although no mention of this element appears in the above definition.⁶³

Under Section 124A of the Bangladesh Penal Code, no such intention is necessary, and therefore, any criticism which may bring into hatred or contempt or excite disaffection against the government is seditious, even though no violence is intended or results, subject only to a saving qualification in respect of the mere pointing out of errors or defects in the government.⁶⁴

Whatever may have been the significance and the scope of its application before the immunity of speech was guaranteed by Article 39 of the Constitution, Section 124A of the Bangladesh Penal Code should now be read in the context of the changed circumstances. Some distinction between making a demand, whether political or economic, and the adoption of means to achieve the object must be recognised. This has been nicely expressed in a case where the petitioner was convicted under Section 124A for demanding that certain tract of Pakistan should be named as Pakhtoonistan.⁶⁵

⁶² Sedition is defined in Stephen's *Digest* as follows:

"A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, Her Majesty, her Heirs or successors or the Government and Constitution of the United Kingdom by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in church or state by law established., or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill will and hostility between different classes of such subjects."

⁶³ *R. v. Burns*, (1886) 2 T. L. R. 510; *R. v. Aldred*, (1909) 22 Cox C. C. 1.

⁶⁴ Section 124A of the Bangladesh Penal Code provides: "Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards Government of Bangladesh established by law shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine."

⁶⁵ *Hussain Buksh Kausar v. The State*, PLD 1958 Pesh 15. In *The State v. Abdul Gaffar Khan*, PLD 1957 Lah 142, Shabir Ahmad J expressed the

"It is permissible for a citizen to hold up the men who form the executive government to ridicule and contempt if they are guilty of maladministration. All that the accused had done was to give an exaggerated emphasis on the treatment meted out to a leader of a political party while under custody. It is not the criticism of the government, in whatever venomous and enraging words it is cloaked which constitutes an offence under Section 124A but the adoption of methods for the attainment of a purpose which encourage force and violence and which may lead to conflict with the authorities with the certainty that there will be grievous loss of life. Short of that every criticism of government is permissible."

This view approximates to that taken by the courts in the United Kingdom in their attempt at defining what constitutes sedition.

Words and acts (speech is also act) must be judged in the light of conditions in the contemporary society.⁶⁶ Bitter criticism of the government policy which was advocated as having resulted in the predominance of West Pakistan in the administration of the country and demand of regional autonomy for East Pakistan, now forming the State of Bangladesh were not considered as sufficient to show that the person detained under Rule 32(1) (b) of the Defence of Pakistan Rules, 1965 indulged in any activity prejudicial to the country's security, or to the public safety. In the words of Salauddin J,

"As long as the law of the land permits oppositional activities and some amount of freedom of thinking and expression, mere expression of opinion, however much unpalatable it may be to the Government of the day, does not...call for any action under a special law like the Defence of Pakistan Rules unless such opinion tends to disturb the peace and tranquillity of any region or create a law and order situation or endanger the maintenance of essential supplies and services."⁶⁷

opinion that if hatred, contempt or disaffection was created against the existing political system or attempts were made for that purpose, the security of the country would be prejudicially affected and therefore Section 124A of the Penal Code was not hit by the constitutional, guarantee of free speech. In this case the respondent was charged under Sections 123 A, 124 A and 153 A of the Penal Code.

⁶⁶ *Reazuddin Ahmad on behalf of Abdul Momen v. D. C., Dacca*, (1969) 21 DLR (Dac) 169.

⁶⁷ *Ibid.*, at p. 171.

The standard of an average prudent person was applied in arriving at the conclusion.

In a case⁶⁸, prior to India's independence, it was observed that "if a man excites or attempts to excite feelings of disaffection, great or small, he is guilty under Section 124A. It does not consist in exciting rioting or rebellion or any sort of actual disturbance great or small. Whether any disturbance or outbreak was caused by these articles is absolutely immaterial.....if he tried to excite feelings of enmity to the government, that is sufficient to make him guilty under this section."

Strachey J expressed the opinion that the whole question is one of intention of the accused as to whether he intended to excite in the minds of the people feelings of disaffection or enmity to the government or intended merely to excite disapprobation of certain government measures. This view was confirmed by the Judicial Committee of the Privy Council in a later case.⁶⁹

Though the distinction between disapprobation of government measures and abuse of government may at times appear to be thin, it is not altogether illusory.⁷⁰ If from a reading of the speech as a whole it does not appear to have intended or was likely to excite disaffection, hatred etc., as mentioned in Rule 41(6) of the Defence of Pakistan Rules, 1965 it cannot be construed as a prejudicial act.⁷¹ Whether a writing or speech constitutes a 'prejudicial act' the Court must put that construction upon it "which is in conformity with the changes effected by the passage of time in the political consciousness and the mental outlook of the people and in their ability to discern between

⁶⁸ *Queen Empress v. Tilak*, (1897) ILR 22 Bom 112.

⁶⁹ *Sadasiv Narayan v. King-Emperor*, AIR 1947 PC 82.

⁷⁰ *Shaikh Fazlul Haque Moni v. The State*, (1970) 22 DLR (Dac) 136.

⁷¹ Rule 41 (6) provides as follows: Prejudicial act means any act which is intended or likely

(e) to bring into hatred or contempt or to excite disaffection towards the Government established by law;

(g) to promote feeling of enmity and hatred between different classes of citizens;

(h) to cause fear or alarm to the public or to any section of the public..

appeal to passion and appeal to reason.”⁷² In saying that democracy functions best in an atmosphere of free and frank discussion, Abdullah Jabir J, as he then was, asserted that

“the right of the people to express themselves freely and frankly and, if need be strongly and even bitterly against what may have been supposed to be lapses on the part of the Government could not be abridged so long as such expression did not degenerate into mere abuse intended or calculated to rouse the emotions of the people to a pitch wherefrom they might be tempted to take recourse to violence or to create chaos in the country or to disrupt the normal life of the people.”⁷³

The Indian Press Commission stated that the definition of sedition in the Indian Penal Code which has not yet been altered is *ultra vires* the Constitution and recommended its repeal. The Commission, however, recognised that inciting violence in order to change the government should still be an offence.

In *Saran v. State*⁷⁴ certain speeches allegedly attempted to bring government into hatred or contempt, incite disaffection toward the Government of India and stir up class hatred were held to have not in fact done so. It was observed that the speeches made must be considered as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong expression used here and there..... the intention of the speaker in using the words complained of is relevant, but the intention must be gathered from the language used as also from the whole of the circumstances in which the speeches were made including the audience to whom they were addressed.

“Security of Bangladesh” does not mean “public order”. The Supreme Court of India refused to include “public order” within the meaning of the “security of the State”.⁷⁵ Security of

⁷² *Shaikh Fazlul Haque Monti v. The State*, (1970) 22 DLR (Dac) 136.

⁷³ *Ibid.*

⁷⁴ AIR 1954 Pat 254; In *Tara Singh v. The State*, (1951) SCR 729, it was held that section 124A was *ultra vires* as being outside the limits of Article 19 (2).

⁷⁵ *Romesh Thappar v. State of Madras*, AIR 1950 SC 124; *Brij Bhushan v. State of Delhi*, AIR 1950 SC 129.

state is only threatened when crimes of violence for overthrowing the government are committed or when external aggression or war breaks out and not by minor breaches of peace and tranquillity.

"The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree, as if they were differences in kind."⁷⁶

The words 'in the interest of the security of Bangladesh' are wider than the words 'matters which undermine the security of the State'.

To maintain international relationship it is essential that limitations on freedom of speech and expression should exist.

In England, any person at common law is guilty of a misdemeanour who publishes any libel tending to degrade, revile or expose to hatred and contempt any foreign prince or potentate, ambassador or other foreign dignitary, with intent to disturb peace and friendly relations between the United Kingdom and the country to which any such person belongs. In order to prevent the deterioration of relationship with states which are friendly to the United Kingdom, the Foreign Enlistment Act, 1870, declares certain acts by a British subject to be offences.

Members of the Commonwealth of Nations are not 'foreign states'.

The Foreign Recruiting Act, 1874, empowers the Executive to prohibit recruitment and enlistment, and inducement of or attempt to induce any person to accept employment in the service of a foreign state.

Legislation reasonably restricting propaganda in favour of rival claimants to positions of authority in foreign states and in favour of war with a State at peace with Bangladesh would also be constitutionally valid limitations on the right of free expression.

The Foreign Relations Act, 1932, provides for conviction and punishment on the complaint of Government of persons who made defamatory statements against foreign rulers, their consorts and chief ministers. This statute would seem to come within the scope of this constitutional limit to freedom of expression.

Restrictions in the Interests of Public Order

The expression "public order" signifies that state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the government which they have instituted for ordinary or local breaches of public order were not sufficient ground for curtailing the freedom of speech guaranteed by the Indian Constitution which, as, originally promulgated, permitted restrictions on the right aimed at preventing the security of the State being condemned.⁷⁷ The decision necessitated the Indian Constitution (First Amendment) Act, 1951, which included "public order" in Article 19 as an independent ground for restricting the freedom of speech and expression. Article 39 of the Bangladesh Constitution substantially agrees with the amended Indian version of its Article 19(1)(a).

The Federal Court of India held that the expression "public order" is wide enough to include public safety or interest.⁷⁸ The danger to human life and safety and the disturbance of the public tranquillity fall within the purview of the expression "public order."⁷⁹

⁷⁷ *Romesh Thappar v. State of Madras*, AIR 1950 SC 124.

⁷⁸ *Emperor v. Sibnath*, AIR 1943 FC 75.

⁷⁹ *Abdul Hamid v. D. M.*, PLD 1957 Lah 213. In some Indian cases the distinction between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance has been considered. *Ram Manohar Lohia v. State of Bihar*, AIR 1966 SC 740; *Arun Ghosh v. State of West Bengal*, AIR 1970 SC 1228; *B. Sundara Rao v. State of Orissa*, AIR 1972 SC 739. It may, however, be mentioned that these cases involved the consideration of the expression "public order" which occurred in the Preventive Detention laws. With reference to such laws, this expression as used in Article 37 of the Bangladesh Constitution has been considered in *Oali Ahad v. Govt.*, (1974) 26 DLR 376.

Would Section 124A of the Bangladesh Penal Code be declared void by reason of Article 39 of the Constitution if hatred etc., was created against persons who exercise the powers of executive government or attempts to that effect were made and the probable result would be a breach of public order? A similar question raised with reference to the fundamental right to free expression guaranteed by the Constitution of Pakistan, 1956 was answered in the negative.⁸⁰ Views were also expressed in the same case that there can be no manner of doubt that if acts mentioned in Section 153A of the Penal Code which makes punishable the promotion of hatred and enmity were not offences, public order would be prejudicially affected.⁸¹

Publication or distribution of pamphlets containing most filthy and vitriolic attack on the integrity and character of the Chief Justice of a High Court has no rational connection with the maintenance of law or public order.⁸²

Where orders were passed under Section 9 of the East Pakistan Public Safety Ordinance, 1958 prohibiting the printer and editor of the daily Ittefaq from publishing any matter relating to students' strikes, meetings, grievances etc., the question whether they imposed reasonable restrictions upon the freedom of speech and expression guaranteed by the Constitution (of 1962) was answered in the negative. Insofar as the provisions of Section 9 left everything to the subjective satisfaction of the authority, it was the sole judge as to the necessity of passing the orders for the purpose of securing public safety or the maintenance public order. Sattar J, in saying that powers must be conceded to the executive to judge "as to what preventive measures are to be taken to avoid the threatened breach of the peace, did not

⁸⁰ *State v. Abdul Gaffar Khan*, PLD 1957 Lah 142.

⁸¹ Section 153A provides as follows:

Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of (the citizens of Bangladesh) shall be punished with imprisonment which may extend to two years, or with fine, or with both.

⁸² *Sodhi Shamsher Singh v. State of Pepsu*, AIR 1954 SC 276.

fail to notice that powers conferred by Section 9 were indeed very wide and that "they are to be exercised only if it (the executive) were satisfied as to the necessity of using them for securing public safety or the maintenance of public order," and further added that "a case of mala fide exercise of power is always subject to judicial interference".⁸³

In Britain the Public Order Act, 1936 deals with the permissible limits of public speech.⁸⁴ In a case which required the construction of the provisions of Section 5 of this Act, the nature of the words used at public or political meetings which might make speakers liable to be prosecuted if there is likelihood of breaches of peace by hooligans and unreasonable people was considered—the question being whether the words used by the speaker or the intention of the trouble-makers who were present at the meeting and wanted to prevent it occasioned the breach of the peace.⁸⁵ Lord Parker CJ could not, it appears, persuade himself to think of the audience as "a hypothetical audience of ordinary, reasonable citizens, whatever their creed, faith, race or political views might be" or as an audience which consisted of nobody "who was intent, for instance, on breaking up the meeting, whatever words the speaker used". It could not even be imagined, the Chief Justice said, that any reasonable citizen would not be "provoked beyond endurance, and not only a Jew but a coloured man, and quite a number of people of this country who were told that they were merely tools of the Jews, and that they had fought in the war on the

⁸³ *Tafazzal Hossain v. Govt. of East Pakistan*, PLD 1965 Dac 68 at p. 78.

⁸⁴ Section 5: "Any person who in any public place or at any public meeting uses threatening, abusive, or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence". The Race Relations Act, 1965 has imposed new restrictions on speech and publication.

⁸⁵ In his opening words the speaker said: "As for the red rabble here present with us in Trafalgar Square it is not a very good afternoon at all. Some of them are looking far from wholesome, more than usual I mean. We shall of course excuse them if they have to resort to smelling salts or first aid. Meanwhile, let them howl these multi-racial warriors of the Left. It is a sound that comes natural to them, it saves them from the strain of thinking for themselves."

wrong side". In his judgment there was no room "for any test as to whether any member of the audience is a reasonable man or ordinary citizen". For, even assuming that the audience consisted of hooligans the speaker "must take the audience as he finds them", otherwise if the words used by him threaten, abuse or insult that audience or part of that audience and thereby provoke a breach of the peace, he is guilty of an offence. He concluded by saying,

"A man is entitled to express his own views as strongly as he likes, to criticise his opponents, to say disagreeable things about his opponents and about their policies, and to do anything of that sort. But what he must not do is...he must not threaten, he must not be abusive and he must not insult them, "insult" in the sense of "hit by words."⁸⁶

In some of the states in the United States of America causing of loud noise in streets and public places by means of loud-speakers, heckling in public meetings and assemblies making utterances tending to lead to a breach of peace and the use of the public streets for holding meetings are prohibited in the interest of public order.

In some cases the breach of the peace statutes were used by the courts to convict persons for addressing any offensive, derisive or annoying words to any other person in any street or other public place or for participating in hostile demonstrations. Thus, where a city marshal was called "a God damned racketeer" and "a damned Fascist" by the defendant his conviction was upheld on the ground that the little value that might be derived from the "fighting" words was far outweighed by the social interest in order and morality.⁸⁷ But, on the other hand, the United States Supreme Court reversed the conviction of a person who was charged for violating the Chicago breach of the peace ordinance. His address had caused a public disturbance. The trial court directed the jury that the breach of the peace occurred when the speech "stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance." The

⁸⁶ *Jordan v. Burgoyne*, (1963) 2 QB 744 at 749.

⁸⁷ *Chaplinsky v. New Hampshire*, 315 US 568 (1942).

Supreme Court viewed such construction of the statute as unwarranted and, therefore, declared it invalid. In the words of Mr. Justice Douglas,

“A function of free speech under our system of government is to invite dispute. It may indeed serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for an acceptance of an idea.”⁸⁸

He then went on to say that though the freedom of speech is not absolute, it is protected against censorship or punishment unless it is “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest...For the alternative would lead to standardisation of ideas either by legislatures, courts or dominant political or community groups.”⁸⁹

Where a group of persons were told by the police chief that it would be permissible for the group to demonstrate near the court-house for a limited period, the conviction of the defendant for causing obstruction of public passages, picketing or parading in or near a court-house was reversed by the Supreme Court on the ground that what the defendant had done in reliance on the assurance of the police chief amounted to an entrapment which violated due process of law. As a matter of fact, the defendant had been arrested for making a speech in which he urged his listeners to go eat at places that refused to serve Negroes. In stating that the Court must not be understood “as sanctioning riotous conduct in any form or demonstrations, however peaceful their conduct or commendable their motives which conflict with properly drawn statutes and ordinances designed to promote law and order...and other essential governmental functions”, Mr. Justice Goldberg concluded by saying that:

“There is no place for violence in a democratic society dedicated to liberty under law, and that the right of peaceful protest does not mean

⁸⁸ *Terminiello v. City of Chicago*, 337 US 1 at p. 4 (1949).

⁸⁹ *Ibid.* This decision was followed in *Edwards v. South Carolina*, 372 US 229 (1963).

that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey valid laws and regulations. There is an equally plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal; for regulation of conduct that involves freedom of speech and assembly not to be so broad in scope so as to stifle First Amendment freedoms, which need breathing space to survive."⁹⁰

Restrictions in the Interest of Decency or Morality

"Decency" and "morality" are wider than the word "obscenity" which is used in English law. But "decency" and "morality" are not identical terms.⁹¹ The notions of decency or morality differ not only from country to country and from age to age but between man and man in the same country and in the same age. Yet in all countries, the necessity of some restrictions on the freedom of expression in the interests of decency and morality is recognised.

In the mid-Victorian era in England one could hardly mention sex in decent society without giving offence. In those days the legs of tables and pianos were covered by muslin frills for the sake of propriety, and that the works of male and female authors were kept apart on the book-shelves unless such authors were already married. Official censorship of stage plays began with the Licensing Act of 1737. In the early nineteenth century prosecutions were generally started in cases of coarsest type of pornographic literature. The Vagrancy Act, 1824, made it an offence to expose obscene publications in the highway or any place of public resort.

In 1857 the Obscene Publications Act was passed. It empowered justices to authorise the seizure of any publication believed to be obscene and being kept for sale or distribution for the purposes of gain. During the debate on the Bill in the House of Lords it was asked "How do you propose to define what

⁹⁰ *Cox v. Louisiana*, 379 US 536 (1965).

⁹¹ Though in the Concise *Oxford Dictionary* the word 'obscene' has been defined as 'indecent, lewd'.

is an 'obscene' publication?.. In the works of some of our most eminent poet there are some objectionable passages, which, under this measure, might cause them to be considered obscene publications". The answer given was that the measure was intended to apply exclusively to books written for the single purpose of corrupting the morals of youth, and of a nature calculated to shock the common feelings of decency in any well-regulated mind.

In the case of *Hicklin*,⁹² Cockburn CJ gave judicial interpretation of the Act. The fact alleged was that an anti-papistical pamphlet which aimed at exposing the practices of the confessional contained many immoral passages. The question was whether it was obscene within the meaning of the 1857 Act. In the following words the Chief Justice formulated the test:

"I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."⁹³

Applying this test the pamphlet was found to offend against the Act. The view of the sponsor of the Act that it was aimed at works 'written for the sole purpose of corrupting the morals of youth' was replaced by a purely objective standard, namely the actual tendency of the work.

There has been a change in the attitude of the Courts as witnessed by the charge to the jury of Stable J in *Rex v. Martin Secker Warburg Ltd.*,⁹⁴ which may be regarded as an attempt to lay down a more liberal test than that imposed by the *Hicklin* judgment. In 1954, the publishers were prosecuted for publishing a novel dealing with contemporary life in New York which largely stressed the relationships between the sexes. In the opinion of Stable J, the *Hicklin* judgment has to be applied by present-day standards taking into consideration the prevailing attitude towards sex. He pointed out that somewhere between the two extreme approaches, one that regarded sex as a sin and

⁹² *Queen v. Hicklin*, (1868) L. R. 3 QB 360.

⁹³ *Ibid.*, at p. 371. Publication constitutes the essential ingredient of the offence. *Straker v. D.P.P.*, (1963) 1 All E.R. 697.

⁹⁴ (1954) 2 All E. R. 683.

tried to conceal everything about it, and the other that thought that only evil would flow from secrecy and concealment, the average decent, well-meaning man or woman took his or her stand. To judge the standard by which the tendency to corrupt has to be measured, he said

“Are we to take our literary standards as being the level of something that is suitable for the decently brought up young female aged fourteen? Or do we go even further back than that and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is, of course, not. A mass of literature, great literature from many angles, is wholly unsuitable for reading by the adolescent, but that does not mean that a publisher is guilty of a criminal offence for making these works available to the general public.”⁹⁵

He went on to say:

“If we are going to read novels about how things go on in New York, it would not be of much assistance, if we were led to suppose that in New York no unmarried woman or teenager has disabused her mind of the idea that babies are brought by storks or are sometimes found in cabbage patches or under gooseberry bushes?...You have heard a good deal about the putting of ideas into young heads. Really, is it books that put ideas into young heads, or is it nature?”⁹⁶

The Jury returned a verdict of ‘not guilty’.

Obscenity generally refers to sexual matters. Dr. Johnson defined it as: ‘Immodest, not agreeable to chastity of mind, causing lewd ideas’.⁹⁷

⁹⁵ *Ibid.*, at p. 686. The effect on the mind of an average person must determine whether the publication is obscene, *Sreeram v. Emperor*, AIR 1940 Cal 290.

⁹⁶ *Ibid.*, at p. 687.

⁹⁷ The *Shorter Oxford Dictionary* definition is similar. Havelock Ellis found the obscene in whatever is “off the scene” and not openly shown on the stage of life, *Revolution of Obscenity in More Essays*. The obscene in this sense is found in the public exposure of the naturalistic aspects of sexual and excremental processes. To some, it is that which arouses “lower passions or indulgence in sensuality”. But most writers have been unable to give a definite or acceptable meaning, Lawrence, *Pronography and Obscenity*, 5-9 (1929); Russell, *The Recrudescence of Puritanism in Sceptical Essays*, 124 (1952).

Being unable to define what obscenity is, writers sometimes turn to the word “Pornography”. But “obscene” is broader than “pornography”

We now look at some of the United States Courts' decisions in formulating a definition of obscenity. We have seen the test of obscenity framed by Lord Chief Justice Cockburn in the case of *Queen v. Hicklin*. It was soon adopted by American Courts.⁹⁸ Though Judge Learned Hand adopted this famous test in *United States v. Kennerley*⁹⁹ he at the same time indicated his dissatisfaction with the harsh rule of the *Hicklin* case in these now-famous words:

"...I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time.... I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too

since it includes profanity and expletives, whereas "pornography" is limited to books that are intended to be aphrodisiacs, Scott, *Into Whose Hands*, 38 (1945). Another writer has said:—"We may define pornography, cross-culturally, as words or acts or representations that are, calculated to stimulate sex-feelings independent of the presence of another loved and chosen human being". Mead, *Sex and Censorship in Contemporary Society*. D. H. Lawrence in his '*Pornography and Obscenity*' (1929) defined "genuine pornography" as that which insults sex and the human spirit. Havelock Ellis wrote of "the vulgar, disgusting, and stupid form of obscenity called pornography—the literature and art that is a substitute for the brothel and of the same coarse texture." It is seen that as a concept pornography is as hard to define as obscenity.

The Geneva Conference on the Suppression of the Circulation and Traffic in Obscene Publications admitted they could not find a satisfactory definition of the obscene. In America the State legislatures in enacting statutes prohibiting obscene literature add one or more from the following words:—disgusting, filthy, indecent, immoral, improper, impure, lascivious, lewd, licentious, and vulgar. As has been suggested by some writer that obscenity includes three different factors: (1) offensiveness (2) an ideological element that seeks to protect moral standards from criticism, and (3) stimulation of sexual impulses and impure thoughts that may lead to immoral conduct. It may be submitted that the third factor is difficult to establish by evidence of the result ensuing on reading such book. "Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest." *Roth v. U.S.*, 354 US 476 (1957).

⁹⁸ *U. S. v. Rosen*, 161 US 29, 43 (1896).

⁹⁹ 209 Fed. 119 (1913).

precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that scheme will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature."

By 1930 the American Courts began to reject the *Hicklin* rule and a new standard for the determination of what is obscene was substituted in its place.¹⁰⁰

Thus, the *Hicklin* rule which ignored literary and other social values, judged a whole book by passages taken out of context, and tested for obscenity by the tendency of the passages quoted to deprave the minds of those open to such influence and into whose hands the book might fall, was definitely given up.

For the limited scope of the work it is not possible to discuss at length other problems involved in any concept of obscenity, such as effect on thoughts, on conduct, on moral standards of the community, offensiveness after reading an alleged obscene book, effect on the probable audience, literary, scientific and other social values, partly and wholly obscene, aim and object and similar other objects.

Sections 292-294 of the Bangladesh Penal Code forbid the sale or distribution of obscene literature and the doing of obscene acts or the uttering or singing of obscene songs etc. in public places. The chapter is headed by the Title 'Offences against Morals'.

¹⁰⁰ In *Roth v. U.S.* and *Alberts v. California*, 354 US 476 (1957), the *Hicklin* test was rejected as unconstitutionally restrictive of freedom of speech and press insofar as it permits judgment on the basis of the effect of isolated passages upon the most susceptible persons. The publication must be judged as a whole and its effect on the average and normal person should be considered. In these two cases it was held that "obscenity is not within the area of constitutionally protected speech or press." In the Indian sub-continent the *Hicklin* test has generally been followed. Anything is obscene that tends to inflame the passion, *Emperor v. Harnamdas*, AIR 1947 Lah 383, or suggests thoughts of a libidinous character, *Shankar v. State of Madras*, AIR 1955 Mad 498. The obscenity is to be judged not by the intention of the writer, *Girdharlal v. State*, AIR 1956 Bom 32.

Sections 20-23 of the Post Office Act, 1898, prohibit the transmission by post of obscene matter and a provision in the Customs Act, 1969, prohibits import of obscene literature. The Dramatic Performances Act, 1876 prohibits any dramatic performance which is 'likely to deprave and corrupt persons present at the performance'.

Contempt of Court: By Publication

The Supreme Court of Bangladesh has the power to punish summarily for contempt.¹⁰¹ To which acts or kinds of speeches or expression such power to punish will be held to extend is not yet settled in Bangladesh, but probably the Courts in Bangladesh will follow the principles laid down by the Supreme Courts in this sub-continent, the United Kingdom and the United States. In the leading case on contempt of court by publication the Supreme Court of Pakistan laid down several principles.¹⁰² The case which involved a conflict of views regarding the constitutional powers of the Government in relation to its servants arose when twentyfive copies of a printed pamphlet entitled "The Transitional Constitution of 1958" containing a talk given by Sir Edward Snelson, Secretary to the Ministry of Law, to Section Officers at Rawalpindi on the Laws (Continuance in Force) Order and certain other Orders of a constitutional nature were sent to the Registrar of the West Pakistan High Court. In it he said that "between 1956 and 1958 the High Courts had used the language of the 1956 Constitution...to claim a jurisdiction to interfere with the Government itself without reference to the strictly

¹⁰¹ Article 108, Constitution of Bangladesh. Though Article 39 has guaranteed freedom of speech and press, it has made an exception in respect of contempt of court and it must, therefore, be read with Article 108 of the Constitution. A Judge of the Supreme Court appointed to an Industrial Tribunal or any such Tribunal may be entitled to exercise the power to punish for contempt under Article 108, if the Act setting up such tribunal permits it to exercise such power, but otherwise not. *Hayles, In the matter of*, AIR 1955 Mad 1 (FB). The provisions of the Contempt of Courts Act, 1926 may apply in the case of disobedience to a writ of *habeas corpus*, *Ikram v. State of U. P.*, AIR 1964 SC 1625.

¹⁰² *Sir Edward Snelson v. Judges of the High Court of West Pakistan*, PLD 1961 SC 237.

defined frontiers of the prerogative writs". His other observations such as "the delegate cannot exercise the power against the sovereign itself", "the Law Ministry has had to appeal a large number of times to the Supreme Court to have the position properly established and has succeeded in every appeal but one", "this was to indicate, as politely as possible, that a writ was a writ, confined to known limits, and the limits could not be exceeded," "every organ of the Government should be best adapted to the work it has to do and should know what that work is and what its own frontiers are", "it prevents usurpation of function and consequent uncertainty, with all the public confusion and private misery that it can lead to" and his further claim to have disregarded a particular judgment of the High Court which denied the Government the power to grant extensions of service, all these, as was mentioned by the High Court of West Pakistan, tended to lower the Court in the eyes of all those who heard or read the talk and to undermine the authority of the Court.

In deciding an appeal from his conviction for contempt, the Supreme Court first differentiated libel from contempt and then proceeded to consider the special position of the courts in general and the superior Courts of record in particular which they must enjoy under any civilised government. If contempt has been committed a superior Court of record can itself initiate prosecution, but before doing so it must find, *in limine* that "the words constitute *prima facie* a libel upon the Court. It is allowed not only to be a judge of its own cause, but can "act in a peremptory and summary manner to check at once all attempts to interfere with the administration of justice". The reasons for conferring such exceptional powers upon a Court of record are clearly expressed in the words of Cornelius CJ:

"The Courts of justice are a creation of the sovereign authority but their mainstay rests in the public confidence, and anything which is calculated to withdraw the public confidence from them has the character of a libel to be visited by action in contempt."¹⁰³

In a proceeding for contempt the plea that the imputation is true is not available. Any attempt to justify the libel upon the

¹⁰³ *Ibid.* at p. 260.

Court is a fresh contempt.¹⁰⁴ It is normally expected that whenever a Court of record indicates, upon its own interpretation of the offending words, that it has taken offence, it should be considered sufficient to induce in the contemner "a feeling of regret that, whether wittingly or otherwise, he should have given cause for such offence". This extraordinary power of punishment for contempt has been given to the Courts in order "to keep a blaze of glory around them and to deter people from attempting to render them contemptible in the eyes of the public". It is for this reason that "no person or institution in a State should feel himself or itself so great as to regard the offer of an apology as being beneath his or its own dignity."¹⁰⁵

Further, as was observed by Kaikaus J, criticism of judgment must be distinguished from imputation of incompetence or mala fides to a Judge: "While it is legitimate to criticise a judgment it is contempt to impute to the Judge anything that lowers him in the public estimation. The mere fact that a judgment is criticised as incorrect is no imputation against the Judge for the most competent of judges may deliver a wrong judgment."¹⁰⁶ If the words or writings are calculated to produce deleterious effects one who uttered or wrote them will be guilty of contempt. The word "calculated" in this context would mean that "the offending words should be of such a nature or character proper or likely to obstruct or interfere in that manner."¹⁰⁷

The Supreme Court was not, however, unmindful of the necessity for judicial restraint. Whether the offending words relate to a case about to be tried, or a case which is actually under trial or has been recently adjudged the Courts should not, as was observed by Hamoodur Rahman J, as he then was, be "too astute in such cases to discover hidden meanings in the words used in making such criticism nor be unduly touchy or sensitive nor should they take notice of any and every derogatory comment where there is no real likelihood of any substantial interference

¹⁰⁴ *Ibid.* at p. 261.

¹⁰⁵ *Ibid.*, at p. 262.

¹⁰⁶ *Ibid.*, at p. 309.

¹⁰⁷ *Ibid.*, at p. 315.

with the due course of justice.”¹⁰⁸ The reasons for exercising such restraint were advanced by S. A. Rahman J: “The power to commit should be sparingly used and any technical or formal contempt should be ignored, as hypersensitiveness on the part of Judges would stifle that spirit of free discussion on matters of public interest, which is the hallmark of democratic societies. Judges too share the common failings of humanity and a claim of infallibility has never been set up on their behalf.”¹⁰⁹

In the United States, the power of the federal courts to punish for contempt by summary action had been confined by Congress to “misbehaviour of any person in their presence, or so near thereto as to obstruct the administration of justice. While a suit was pending in a federal district court involving the rights of a street car company against the city granting it franchise, a newspaper wrote in favour of the city. The Supreme Court held that the power to punish summarily for contempt extended to acts which had a “direct tendency to prevent and obstruct the discharge of judicial duty.”¹¹⁰ In later cases, however, this principle did not find any more approval. For “the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.”¹¹¹ The argument that an accuser should not be judge was advanced in the case of *Nye v. United States*¹¹² for restricting the power of the federal judges to punish summarily for contempt for misbehaviour which were committed “in their presence or so near thereto as to obstruct the administration of justice”. The words were construed narrowly as the terms used were held to be geographical. Acts not within these terms might be punished. But if so, they would follow the usual pattern of criminal procedure: indictment, jury trial, and trial before an impartial, disinterested judge. In

¹⁰⁸ *Ibid.*, at p. 314.

¹⁰⁹ *Ibid.*, at p. 283.

¹¹⁰ *Toledo Newspaper Co. v. U. S.* 247 US 402 (1918).

¹¹¹ *Craig v. Harnev*, 331 US 367 at 376 (1947).

¹¹² 313 US 33 (1941).

*Bridges v. California*¹¹³ the power asserted was the inherent power of courts to punish for contempt. Certain comments appeared on litigation pending before the State Courts of California. Black J said:

“...it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.”

It was held that:

“concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. Even if the utterances contain “half-truths” and “misinformation” this principle will apply.”¹¹⁴

About the other evil feared apart from disrespect for the judiciary was the disorderly and unfair administration of justice. Black J said: “We must therefore, turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment”. To the same effect the following observations were made in *Craig v. Harney*:

“The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.”¹¹⁵

Though in cases involving contempt by publication the Indian Courts have not followed the later American decisions on the subject, yet in a case¹¹⁶ concerning resolutions passed by a Bar Association which related to the conduct of certain judicial officers,

¹¹³ 314 US 252 at 271 (1941). Similar observations were made by the Supreme Court of Pakistan in the case of *M. H. Khondker v. The State*, PLD 1966 SC 140 at pp. 169 and 177.

¹¹⁴ *Pennekamp v. Florida*, 328 U. S. 331 (1946); *New York Times v. Sullivan*, 376 US 254 (1964).

¹¹⁵ 331 US 367 (1947).

¹¹⁶ *Prakash v. Uttar Pradesh*, AIR 1954 SC 10.

the observations of the Indian Supreme Court sounds similar to those of Black J in *Bridges v. California*: "The reflection on the conduct or character of a judge in reference to the discharge of his official duties, would not be contempt if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in courts can be created...when attacks or comments are made on a judge or judges disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the judge and what amounts really to contempt of court. The fact that a statement is defamatory so far as the judge is concerned does not necessarily make it a contempt."

In other cases decided by the Indian High Courts the principle enunciated in the *Toledo Newspaper Co. v. United States* is seen more or less applicable. Where an article was published with the 'intention' of prejudicing the fair trial of a pending case, there could be no hesitation in applying the law of contempt against the offending newspaper.¹¹⁷ A journalist could not claim more privilege than an ordinary citizen in the matter of freedom of expression and as such he, like the latter, is subject to reasonable restriction of the law of contempt. It was observed that the judge by reason of their office were precluded from entering into any controversy in the columns of the public press, nor could enter the arena and do battle in newspaper as an ordinary citizen could do.¹¹⁸

A newspaper was held in contempt for criticizing a judgment of the Supreme Court of India on the rights of advocates to practise before that Court.¹¹⁹ It was said that no objection could have been taken to the article had it merely preached to the courts of law the sermon of divine detachment 'But when it proceeded to attribute improper motives to the judges, it not only transgressed the limits of fair and *bona fide* criticism but had a clear tendency to affect the dignity and prestige of this Court...It is obvious that

¹¹⁷ *State v. Editors*, AIR 1954 Orissa 149.

¹¹⁸ *State v. Ahmad*, AIR 1954 Hyder. 175.

¹¹⁹ *Ghosh v. Bose*, 16 SCJ38.

if an impression is created in the minds of the public that the judges in the highest court in the land act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined'. It will be recalled that in *Bridges v. California* the argument based on the ground of undermining administration of justice was rejected by the Court unless it could be proved that the unfair administration of justice was a likely consequence and whether the degree of likelihood was sufficient to justify summary punishment.

In a case before the Supreme Court of India the restrictive influence of the law of contempt on the freedom of speech and expression was recognised and it was held that the law of contempt should not be so applied as to whittle down the guarantee of free speech:

"While the right is essential to a free society, the Constitution has itself imposed restrictions in relation to contempt of court and it cannot therefore, be said that the right abolishes the law of contempt or that attacks upon judges and courts will be condoned. Freedom of speech and expression will always prevail except where contempt is manifest, mischievous or substantial. The question always is on which side of the line the case falls."¹²⁰

In English law fair and reasonable criticism of a judicial act does not constitute contempt. "Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against a judicial act as contrary to law or the public good, no court could or would treat that as contempt of court."¹²¹ Again, it was observed in *Ambard v. Attorney General of Trinidad* that:

"Where the authority and position of an individual Judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercise the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism

¹²⁰ *E. M. S. Namboodripad v. Narayan Nambiar*, AIR 1970 SC 2015

¹²¹ *Rex v. Grey*, (1900) 2 QB 36 at 40.

and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: She must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”¹²²

Defamation

In English law libel is an actionable wrong and it is an indictable offence when there is a threat to public peace. By the Larceny Act, 1916, it is an offence to extort any valuable things from any person or procure any appointment or office by libelling or threatening to libel.

Defamation is a generic term used in English law to mean both ‘libel’ and ‘slander’. Section 499 of the Bangladesh Penal Code dealing with the criminal law of defamation makes no distinction between defamation either by spoken words or writing.

Incitement to an Offence

Incitement to break a law should be distinguished from incitement to an offence because “every breach of law does not amount to an offence.”¹²³ The petitioner was charged under the provisions of Section 3 of the U. P. Special Powers Act, 1932, which made it penal for a person by spoken words to instigate a class of persons not to pay dues recoverable as arrears of land revenue. The provisions were found inconsistent with Article 19 (1) (a) of the Indian Constitution.

Section 4 (1) (a) of the Press (Emergency Powers) Act, 1931, provides for a printer or publisher’s deposit when a publication contains words or visible representation which incite to or encourage, or tend to incite to or encourage the commission of any offence of murder or any cognizable offence involving violence. With reference to these provisions it was observed by the Indian Supreme Court that the speeches or expressions on the part of an individual which incited to or encouraged the commission of violent crimes, such as murder could not but be matters which would undermine the security of the State.¹²⁴ Mahajan J said:

“In order to determine whether a particular document falls within the ambit of any of the clauses of Section 4 (1), the writings has to be

¹²² (1936) AC 322 at 335.

¹²³ *Dr. Ram Monohar Lohia v. Suptd., Central Prison, Fategarh*, AIR 1955 All 193.

¹²⁴ *Bihar v. Shailabala Devi*, AIR 1951 SC 329.

considered as a whole and in a fair and free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there, and an endeavour should be made to gather the general effect which the whole composition would have on the mind of the public.”

In the same case it was said by Mukherjee J that account should also be taken of the place, circumstances and occasion of the publications, as a clear appreciation of the background in which the words were used was of great assistance to the Court in viewing them in their proper perspective.

There is a distinction between ‘advocacy’ and ‘incitement’.

Mr. Justice Holmes of the U. S. Supreme Court while saying that the manifesto in which the defendant urged strikes and communist revolution was an incitement, referred to this distinction. Every idea, he said, is an incitement.

“It offers itself for belief and if believed it is acted on unless some other belief outweighs it....The only difference between the expression of a belief and incitement...is the specific enthusiasm for the result.”¹²⁵

Later on, several decisions of the American Supreme Court have, however, discredited this principle.¹²⁶ They have, as observed quite recently, fashioned the principle that “the Constitutional guarantees of free speech and free press do not permit a State to forbid or prescribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹²⁷ The contrary teaching of *Whitney v. California*¹²⁸ was overruled by this decision. Mr. Justice Douglas tried to draw the distinction between advocacy and incitement by saying “The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.”¹²⁹ When the advocacy

¹²⁵ *Gitlow v. New York*, 268 US 652 at 673 (1925)

¹²⁶ *Dennis v. U. S.* 341 US 494 (1951); in *Noto v. U. S.*, 367 US 290 at pp. 297-98 it was said that ‘the mere abstract teaching...of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.’

¹²⁷ *Brandenburg v. Ohio*, 395 US 444 (1969).

¹²⁸ 274 US 357 (1927).

¹²⁹ *Brandenburg v. Ohio*, 395 US 444 at p. 456 (1969).

'would be immediately acted upon' causing a clear and present danger, it would be regarded as incitement.¹³⁰ It must be acknowledged that to bring out the distinction between advocacy and incitement is not an easy task. For, as has been asserted, "advocacy and incitement are not distinct activities (in the sense, for example, that advice and command are distinct activities)... An assertion of alleged fact may be more of an incitement than an assertion about what ought to be done. 'The earth is flat' might not incite. 'The workers are exploited' might well do so, given the right time and place, and to a greater extent than many assertions about policy (e.g. 'The constitution should be revised'). Whether an assertion 'incites' is not a matter of grammatical or logical form but of all the circumstances of time, place, and enthusiasm in which it occurs. The appropriate question is not whether there should be incitement, but what it is permissible to incite."¹³¹ The relation between the free speech problem and the problem of criminal attempt is well illustrated in the following passage:

"If I gather a few sticks and buy a can of kerosene for the purpose of starting a fire in a house ten miles away and do nothing more, I cannot be punished for attempting to commit arson. However, if I put the sticks beside the wall of the house and pour on some kerosene and I am caught before striking a match I am guilty of a criminal attempt. The fire is the main thing, but when no fire has occurred, it is a question of the nearness of my behaviour to the wished for outbreak of a fire. So under the First Amendment, lawless acts are the main thing. Speech is not punishable for its own sake, but only because of its connection with those lawless acts whether they occur or not. But more than a remote connection is necessary here, just as in the case of the attempted fire. The fire must be close to the house; the speech must be close to the lawless acts. So long as the speech is far away from action, the Constitution protects it."¹³²

¹³⁰ *Whitney v. California*, 274 US 357 at 372, 376 (1927) As Justice Brandies said that in order to suppress free speech there must be 'reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable grounds to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one'. In this case advocacy was distinguished from incitement, preparation from attempt and assembly from conspiracy.

¹³¹ Geoffrey Marshall, *Constitutional Theory*. at pp. 160-161. (1971)

¹³² Chafee, *Thirty-five Years With Freedom of Speech*.

CHAPTER EIGHT

FREEDOM OF RELIGION

Concept of Religion

Article 41 of the Constitution guarantees to every citizen the liberty of religion.¹ The right is, however, "subject to law, public order and morality". Clause (a) allows the profession, practice or propagation of any religion, while Clause (b) gives every religious community or denomination the right to establish, maintain and manage its religious institutions.

In discussing the freedom of religion, the initial difficulty that is felt is the lack of any definite idea of the concept of religion and at the same time the absence of any definition in the Constitution. Usually speaking, however, we refer to some such institutions as Islam, Christianity, Hinduism, Buddhism and Shintoism and are prepared to include other less popular institutions whenever we talk about "religion". But it is difficult to define with precision the essential elements of a religion; it seems to cover the body of objects, practices, and beliefs of a human community with a recognised name; it also covers the sum, selected from some or all, of the acts, aspirations and beliefs of a human being.

As we are mostly concerned with judicial utterances, we shall examine such pronouncements as have been made to define what religion is.

Scope of "Religion"

In a case² before the Australian High Court which required

¹ This Article corresponds to Article 18 of the Constitution of Pakistan 1956 and Fundamental Right No. 10 of the Constitution of Pakistan, 1962.

² *Jehovah's Witnesses v. The Commonwealth*, 67 CLR 116 (1943).

the consideration of Section 116 of the Australian Constitution³, Latham CJ said:

"It would be difficult, if not impossible to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist or have existed in the world. There are those who regard religion as consisting principally in a system of beliefs or statement of doctrine. So viewed a religion may be either true or false. Others are more inclined to regard religion as prescribing a Code of Conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious observance. Many religious conflicts have been concerned with matters of ritual and observance... What is religion to one is superstition to another. Some religions are regarded as morally evil by adherents of other creeds."

He regarded Section 116 as operating in relation to all the above aspects of religion, irrespective of varying opinions in the community as to the truth of particular religious doctrines, or as to the goodness of conduct insisted upon by a particular religion, or as to the propriety of any particular religious observance.

Article 41 (1) of the Constitution not only guarantees to the citizens the freedom of religious opinions, but also protects the practices observed in following a religion. Thus, the Article, like the Australian Section 116, has expressly negated any possible suggestion that, though the government should not interfere with religious beliefs or opinions, it nevertheless may deal at its option with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion. Latham CJ's opinion about Section 116 that it goes far beyond protecting liberty of opinion and protects also acts done in pursuance of religious belief as part of religion is applicable to Article 41 (1).

³ Section 116 of the Australian Constitution runs as follows: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibition the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth." The right embodied in the second portion of the section had been guaranteed by Article 17 of the Constitution of Pakistan, 1956 and Fundamental Right No. 17 of the Constitution of Pakistan, 1962.

In considering the guarantee of freedom of religion under the Constitution, some discussion on the scope of religion is almost inevitable. Here also, Latham CJ's observations on the matter would seem greatly helpful.⁴

Some of the propositions established in this case in regard to Section 116 of the Australian Constitution will perhaps be relevant in considering Articles 28, 29 and 41 of the Constitution of Bangladesh where the word 'religion' occurs:

"The prohibition in Section 116 operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion. No Federal law can impose any religious observance. Defaults in the performance of religious duties are not to be corrected by Federal law. Section 116 proclaims not only the principles of toleration of all religions, but also the principle of toleration of absence of religion.

In determining what is religious and what is not religious the current applications of the word "religion" must necessarily be taken into consideration.

Section 116 is not required for the protection of the religion of a majority. The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion of minorities, and, in particular, of unpopular minorities).

Under Section 116 there is full legal justification for the court to determine whether a particular law is an undue infringement of religious freedom.

It is consistent with the maintenance of religious liberty for the state to restrain action and course of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community. The Constitution protects religion within a community organised under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organised."

4 "The scope of religion has varied very greatly during human history. Probably most Europeans would regard religion as necessarily involving some ideas or doctrines affecting the relation of man to a Supreme Being. But Buddhism, one of the great religions of the world, is considered by many authorities to involve no conception of a God.....on the other hand, almost any matter may become an element in religious belief or religious conduct. The wearing of particular clothes, the eating or the non-eating of meat or other foods, the observance of ceremonies, not only in religious worship, but in the everyday life of the individuals all of these may become part of religion. Once upon a time all the operations of agriculture were controlled by religious precepts. Indeed, it is not an exaggeration to say that each person chooses the content of his own

While considering the constitutional validity of the Madras Hindu Religious Endowments Act, 1951, the Indian Supreme Court made a few observations on the meaning and definition of religion.⁵

“Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well known religions in India like Buddhism and Jainism which do not believe in God or in any intelligent First Cause. A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who

religion. It is not for a court, upon some a priori basis, to disqualify certain beliefs as incapable of being religious in character.

Thus in the early history of mankind it was almost impossible to distinguish between government and religion. A clear distinction between ruler and priest developed only at a relatively late stage in human development. Those who believe in a Theocracy refuse to draw the distinction between government and religion which is implicit in Section 116. The beliefs of the Anabaptists were similar to those of Jehovah’s witnesses.....The Anabaptists refused to take oaths, they refused to appear before civil law courts, they refused to bear arms or to make any resistance to wrongdoers. The civil governments of the world were regarded by them as pertaining to anti-Christ. Accordingly they would take no public office, and would render only passive obedience to government. Many of the early Christians held similar beliefs. It cannot be said that beliefs upon such matters founded upon Biblical authority (as understood by those who hold them) are not religious in character. Such beliefs are concerned with the relation between man and the God whom he worships, although they are also concerned with the relation between man and the civil government under which he lives. They are political in character, but they are nonetheless religious on that account. It is perhaps not out of place to mention at the present time that the Shinto religion, the way of the Gods, affords a path to universal peace and prosperity under the guidance of the people of Japan. The worship of the Emperor as divine is represented to the Japanese people as the way of escape to happiness for the whole world.

At all periods of human history there have been religions which have involved practices which have been regarded by large numbers of people as essentially evil and wicked. Many religions involve the idea of sacrifice or animal sacrifice as appears in the Old Testament, and in many other sacred writings and traditions. So also religions have differed in their treatment of polygamy. Polygamy was not reprobated in the Old Testament, it has been part of the Mormon religion; it is still an element in the religion of millions of Mohammedans, Hindus and other races in Asia.” 67 CLR at pp. 124-125

⁵ *Commissioner, Hindu Religious Endowments v. L. T. Swamiar*, AIR 1954 SC 282.

profess that religion as conducive to their spiritual well being but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.”⁶

The use of the expression ‘practise’ in Article 41 showed that the guarantee of religious freedom not only protected the freedom of religious opinion but protected also acts done in pursuance of a religion. What constituted the essential part of a religion was primarily to be ascertained with reference to the doctrines of that religion.

In another case⁷ the Indian Supreme Court reiterated the above views on the meaning and content of religion when the question of the validity of certain provisions of the Bombay Public Trusts Act, 1950, whose object was to regulate and make better provisions for the administration of the public and religious trusts in the State of Bombay, came up for its decision. The Act included within its scope, all public trusts created not only for religious but also for purely charitable purposes and extended to all classes and denominations in the State. The Act was, as the appellants contended, in conflict with freedom of religion and the right of the religious denominations or sects to manage their own affairs in matters of religion. The Supreme Court held that where the particular purpose for which a charitable trust was created failed or the trust could not be carried out due to circumstances or a surplus was left after fulfilling the purposes of the trust, the court could give directions for application of the trust fund to objects as nearly as may be to that which the donor intended or in other words to execute it *cy pres*. But when the donor’s intentions were clearly expressed the court should not allow the income to be spent for other purposes because they were considered more expedient or beneficial than what the settlor had directed. “A religion may have many secular activities, it may have secular

⁶ *Ibid.*, at p. 290.

⁷ *Ratilal v. State of Bombay*, AIR 1954 SC 388.

aspects, but these secular activities and aspects do not constitute religion as understood by the Constitution."

In view of the general popular notion that religion embraces almost all human activities which not only characterises Muslim thinking but also that of the other religious groups in the Indian sub-continent, it is conceivable that "religion" has to be given a wide construction. Even the staunchest supporter of absolute freedom of religion will on the other hand admit that at some point a line may have to be drawn between the demands of religion and the state necessities, if a conflict occurs between them.⁸

While it may at once be conceded that every citizen should have the maximum freedom to profess and practise any religious belief and rituals, at the same time this cannot be extended to justifying infringement of the rights of other citizens or the prejudice of the peace, welfare and security of the society to which he belongs. Though in ancient times religion governed all human activities, the energies of the modern state are directed to the improvement of the social, economic and cultural conditions of the subjects. If our life has to be ordered in accordance with the principles and dictates of religion, it has also to conform to

⁸ "The religious conceptions in this country are so vast that they cover every aspect of life from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it, that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance laws relating to tenancy or laws relating to succession, should be governed by religion...I personally do not understand why religion should be given this vast, expansive jurisdiction so as to cover the whole of life and to prevent the legislature from encroaching upon that field."— Dr. Ambedkar, Indian Law Minister who piloted the Indian Constitution, C. A. D. VII 781. In this respect, the Islamic views of the objects of religion, society and the state being completely different from the Western concepts, Muslim jurists would not readily admit the truth of these observations. In essence, the Islamic community or the state, according to such views, must strive for the fulfilment of the law as revealed in the Quran and supplemented by the Sunnah (the practices and sayings of the Prophet).

secular standards. If the ethics of any religion stand as an obstacle to the achievement of the welfare state or even the Fundamental Principles of State Policy as enunciated by Part II of the Constitution, such ethics will have to give way.

Law, Public Order and Morality

By the expression 'subject to law, public order and morality' used in Article 41, religious freedom has been subordinated in the interests of ordered government. Freedom of religion is not absolute. Article 41 has to be applied in conformity with the demand of an organised society, otherwise as has been said by Latham CJ in *Jehovah's Witnesses*' case "the complete protection of all religious beliefs might result in the disappearance of organised society, because some religious beliefs...regard the existence of organised society as essentially evil."⁹

The First Amendment of the Constitution of the United States provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.¹⁰ With reference to the Constitutional guarantees of freedom of speech, freedom of press and freedom of religion, the Supreme Court of the United States said: "They are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument." These privileges were held reconcilable with the right of a state to use the sovereign power to ensure orderly living "without which constitutional guarantees of civil liberties would be a mockery."¹¹ In a case where a law was impugned as an unconstitutional restriction on the right of free exercise of religion because it disfranchised citizens and disqualified them from holding office if they belonged to a church which taught that polygamy was an approved practice, Field J said that the First Amendment was never intended to be

"invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With

⁹ 67 C. L. R. 116 at 126.

¹⁰ *Jones v. Opelika*, 316 US 584 at 593 (1942).

¹¹ *Davis v. Beason*, 133 US 333 at 342, 343 (1890).

man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its people, are not interfered with. However, free the exercise of religion may be it must be subordinate to the criminal laws of the country passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

Both Section 116 of the Australian Constitution and the First Amendment to the United States Constitution declare the right to freedom of religion without any words of limitations, such as has been used in Article 41 of the Constitution by the opening words 'subject to law, public order and morality.' In those countries the limitations have been worked out by judicial decisions on grounds of morality, order and social protection. The opening words of Article 41 have expressly provided for restrictions to be put by the State upon free exercise of religion.

In an appeal from a case before the Dacca High Court¹² the contention was that since in the case of acquisition of *wakf* and *debutter* properties the effect of the East Bengal State Acquisition and Tenancy Act, 1950, was to transfer the ownership of such properties to the Provincial Government and to disposes the mutwallis and shebaitis of possession, the Act adversely affected religious institutions and consequently touched upon the right guaranteed by Article 18 of the Constitution of Pakistan, 1956. On behalf of the Government it was urged in reply that the rights guaranteed by Article 18 could be taken away by statute as Clauses (a) and (b) of the Article were preceded by the words "subject to law". In rejecting the argument as untenable Munir CJ said:

"The very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law, and it is not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law...I consider it to be a fundamental canon of construction that a Constitution should receive a liberal

¹² *Jibendra Kishore v. Province of East Pakistan*, PLD 1957 SC 9 at 41.

interpretation in favour of the citizen especially with respect to those provisions which were designed to safeguard the freedom of conscience and worship."

He was definitely of the view that though under Article 18 every section of a religious denomination has the right to establish, maintain and manage its religious institutions, "the law may regulate the manner in which religion is to be professed, practised and propagated and religious institutions are to be established, maintained and managed". He then went on to say "it does not, however, empower the legislature to make a law that hereafter no institutions of a religious character shall be established, maintained or managed or that an existing religious institution shall be abolished. The Article appears to me to proceed on the well-known principle that while legislature may not interfere with mere profession or belief, law may step in when professions break out in open practices inviting breaches of peace or when belief, whether in publicly practising a religion or running a religious institution leads to overt acts against public order".

The Indian Supreme Court made somewhat similar observations while considering the scope of Article 25 of the Indian Constitution¹³:

"Subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others. It is immaterial also whether the propagation is made by person in his individual capacity or on behalf of any church or institution. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief is..... subject to state regulation imposed to secure order, public health and morals of the people."

Chagla CJ of the Bombay High Court said:

"A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order,

¹³ *Ratilal v. State of Bombay*, AIR 1954 SC 388.

morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole.”¹⁴

He quoted Field J’s observations in this respect made in *Davis v. Beason*:

“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices”.¹⁵

In declaring the validity of the Bombay Prevention of Hindu Bigamous Marriage Act, 1946, Chagla CJ found it difficult to accept the proposition that polygamy was an essential or integral part of Hindu religion. In his opinion if the State of Bombay compelled Hindus to become monogamists, it was a measure of social reform. It may, however, be mentioned that under Article 25 (2) (b) of the Indian Constitution the State was empowered to legislate with regard to social reform in spite of the fact that it may interfere with the freedom of religion guaranteed under Clause (1) of Article 25.

Articles 28, 29 and 41 of the Constitution of Bangladesh have guaranteed both religious liberty as well as religious equality. Article 41 which allows every citizen to propagate any religion does not, however, give him an unlimited licence to propagate or disseminate subversive doctrines. As Lord Sumner has aptly said:

“The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact or is believed by its reasonable members to be open to assault. The question whether a given opinion is a danger to society is a question of the times and is a question of fact. Society has the right to protect itself by process of law from the dangers of the moment, whatever that right towards all religions depends fundamentally on the safety of the state.”¹⁶

It is necessary here to point that though Article 41 has subjected the profession of religion along with its practice and propagation, to law, public order and morality, as a matter of

¹⁴ *State of Bomday v. Narasu*, AIR 1952 Bom 84 at 86.

¹⁵ 133 US 637 (1889).

¹⁶ *Bowman v. Secular Society Limited*, (1917) AC 406 at pp.466-67.

fact, it is always the latter and not the former that will be so controlled. Ideas cannot be suppressed, nor the mental processes and the belief formed as a result of those processes by any external agency but, as is known, belief leads to action and precisely this action can be regulated by rules of conduct laid down by either the family, society or the State. But the State, in order to safeguard certain social interests, must not encroach on the substance of the religious freedom of the citizen. In interpreting the First Amendment to the United States Constitution which provides that 'Congress shall make no law respecting an establishment of religion or...prohibiting the free exercise thereof,' the United States Supreme Court observed:

"The Amendment embraces two concepts : the freedom to believe and the freedom to act. The first is absolute but in the nature of things the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such previous and absolute restraint would violate the terms of the guarantee."¹⁷

Profession, Practice and Propagation

The three concepts involved in the idea of religious freedom are closely interlinked. They mark the stages in the same process of development of the religious nature of a man. As already observed, belief is something internal and 'no person can be punished for entertaining or professing religious beliefs or disbeliefs as it is impossible for the State to enquire into a man's profession or belief which are entirely personal.

"The establishment of religion" clause of the First Amendment means at least this : Neither a state nor the Federal Government can set up a Church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain

¹⁷ *Cantwell v. State of Connecticut*, 310 US 296 (1940).

away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.”¹⁸

Though freedom of religious belief has been conceded to be absolute, yet certain practices considered to be immoral or anti-social were not allowed by the courts of the countries which guarantee religious freedom. Thus, in the United States the practice of bigamy, which was permitted by the creed of a religious body, the Mormons, was not allowed, and the Supreme Court observed:

“Congress was deprived of all legislative power over mere opinion, but, was left free to reach actions which were in violation of social duties or subversive of good order.....Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose that one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice ?..... To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”¹⁹

Similarly, the advocacy of supernatural powers to heal diseases was disallowed.²⁰ The state was permitted to enforce health regulations, such as, vaccination,²¹ and segregation for prevention of contagious diseases.²² But the regulations must not be arbitrary or unreasonable. In *Cantwell v. Connecticut*²³ the United States Supreme Court extended the doctrine of ‘clear and present danger’ so as to justify the restriction imposed on religious freedom.

18 *Everson v. Board of Education* 330 US 1 (1947). Here, the American Supreme Court held that the First Amendment “required the state to be neutral in its relations with groups of religious believers and nonbelievers ; it did not require the state to be their adversary. State power was no more to be used so as to handicap religious than it was to favour them.....”

19 *Reynolds v. U.S.* 98 US 145 (1878)

20 *New v. US*, 245 Fed. 710 (1917).

21 *Jacobson v. Massachusetts*, 197 US 11 (1905).

22 *People v. Pierson*, 176 N.Y. 201.

23 310 U.S. 296 (1940).

In connection with the discussion of religious freedom as guaranteed by the Constitution it may not be quite out of place to pose a problem which is still of academic interest. What Article 41 guarantees is the equality before law of all citizens in the matter of pursuing their respective religions and practising their tenets and rituals. From the judgment in *Jibendra's case*, it would seem to follow that a religious practice could not be prohibited unless it was prejudicial to public order or morality. It is obvious, and more so, since Bangladesh has been declared a secular State, that it would not interfere with the forms of worship adhered to by communities other than Islamic. And Hindus, Christians, Budhists and others are at liberty to worship whom and in whatever manner they please. To forbid any such worship on the ground that it is idolatrous, or cherishes beliefs incompatible with the monotheism of Islam would not only be unthinkable but also unconstitutional. On the contrary, Article 41 safeguards the right of each group to freely practise its own religion.

But what would happen if idolatry in some form or another is practised by a section of the Muslim population ? During the British rule in India one of the causes of friction between the Sunni and Shia sects was the observance of the anniversary of the death of Ali, the son-in-law of the Prophet (upon whom be peace), who is looked upon by the Shias with greater reverence than the Sunnis would be prepared to show him. According to the opinion of the orthodox Sunnis, the taking out of the *Muharram* procession to commemorate the death of his sons, Imam Hasan and Imam Hossain with all the attendant practices and rituals derogates from the absolutist unitarian doctrine of their religion. In view of Munir CJ's statement of the principle, a law controlling *Muharram* processions might be valid on the ground that otherwise public disturbances might result, but not on the ground that they are reminiscent of idolatry.

Another practice which is more or less followed by all sections of Muslims, whether Sunnis or Shias and equally objected to by the orthodox Sunnis is the visiting tombs of saints for invoking their assistance mainly, perhaps, to achieve some worldly gains. This again, according to them, smacks of idolatry.

As a matter of fact, the movement by the Wahabiyas, an Islamic community founded by Muhammad bin Abdul Wahab (1703-1787) was mainly directed against the cult of saints, especially condemning the visitation of tombs and building or mausoleums and placing of gifts of food on graves. They regarded themselves as Sunnis of the Hanbali School and called themselves "unitarians". Some of the principles that characterise their faith deserve to be mentioned.²⁴

Relying on this doctrine the Wahabiyas practised the destruction of tombs on a large scale because they were visited by the people for the aforesaid purposes. Though Wahabism gained some followers in India during the nineteenth century, it did not become very popular there.

However, the point of inquiry is whether, if any occasion arises when the practices resorted to by the visitors to the tombs of saints are challenged by a Muslim citizen as contrary to the teachings of Islam or such practices are forbidden by legislation, the Court will uphold the contention of that citizen or the validity of such legislation as not interfering with the religious freedom guaranteed by Article 41 and thus deny to those who frequent such places the right to practise what are deemed by them to be a part of religion. If no question of disturbing public order arises, can the demoralising effect of such practices on the rest of the people of that particular religious denomination be pleaded when soliciting the Court's sanction to stop them? But the Court might declare practices as immoral judged from the point of view of Islam as a whole, as it would seem to the judges, or it

²⁴ *Encyclopaedia of Islam*. Vol. IV, part 2, p. 1086.

1. All objects of worship other than Allah are false, and all who worship such are deserving of death.
2. The bulk of mankind are not monotheists, since they endeavour to win God's favour by visiting the tombs of saints; their practice therefore, resembles what is recorded in the Quran of the Meccan idolatry.
3. It is polytheism to introduce the name of Prophet, saint or angel, into a prayer.
4. It is polytheism to seek intercession from any but Allah.
5. It is polytheism to make vows to any other being.

might prefer a particular interpretation given to a Quranic text by a particular jurist or a school of thought and uphold it as entitled to the protection of Article 41 of the Constitution to profess, practise or propagate any religion or establish and maintain any religious institution. It may be that "every religious denomination enjoys complete autonomy in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion they hold," but the difficulty in arriving at a decision in such cases is felt when there are differences of opinion among the adherents of a particular religion as to a particular practice.

If the court decides to be guided by the principle laid down in *Reynolds v. United States*²⁵ it will have no other alternative to declaring in favour of stopping such practices which run counter to the main unitarian doctrine of Islam; the United States Supreme Court had to uphold legislation prohibiting the practice of bigamy though conforming to the beliefs of a particular sect, on the ground that it was repugnant to Christian morality in general.

Religious Denomination and Institutions

As to the precise meaning of the expression "religious denomination" the Indian Supreme Court adopted the definition in the *Oxford Dictionary* which is "a collection of individual classed together under the same name; a religious sect or body having a common faith and organisation and designated by a distinctive name." According to this definition each one of the

²⁵ 98 US 145 (1878)

The right to propagate religion was tested in some cases decided by the American Supreme Court. Most of them brought by Jehovah's Witnesses declared police restriction against distribution of their literature on the streets or from house to house or the playing of records on streets to willing listeners as unconstitutional, whether such restrictions were imposed by a Municipality, as in *Lovell v. Green* 303 US 444 (1938) or a company owned town, as in *Marsh v. Alabama* 326 US 501 (1947) or the manager in a federal owned village, as in *Tucks v. Texas*, 326 US 517 (1947).

sects or sub-sects founded by the religious teachers and philosophers of the Hindu religion could be called a religious denomination if it was designated by a distinctive name such as the name of the founder, had a common faith and common spiritual organisation.²⁶ There are, besides the well-known divisions of Muslims into Sunni and Shia, many sub-sects of both kinds and other religious groups. Particular notice must be taken of the Ahmadiyyas whom Sunnis and Shias are generally disposed to regard as outside the fold of Islam.²⁷

In *Jibendra Kishore v. Province of East Pakistan*²⁸ the Supreme Court assumed that Muslims as a whole constituted a 'religious denomination'; so, too, did Hindus as a body. The Court proceeded to hold that *wakfs* among Muslims and *debutter* among Hindus were religious institutions and, therefore, the provisions of the East Bengal State Acquisition and Tenancy Act, 1950, affecting these religious institutions, infringed Article 18 of the 1956 Pakistan Constitution.

As no question of law or order was involved, Munir CJ rejected the view of the Dacca High Court as to the constitutionality of the impugned Act as it provided for the acquisition of *wakf* or *debutter* property. He adopted the principle enunciated by Chief Justice Shaw of the Massachusetts Supreme Court on the right of political franchise:-

"That in all cases where the Constitution has conferred a political right or privilege, and where the Constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power, to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right, in a prompt

²⁶ *Commissioner v. Swamiar*, AIR 1954 SC 282.

²⁷ *Report of the Court of Inquiry*—This Court was constituted under Punjab Act II of 1954 to inquire into the Punjab disturbances of 1953. The disturbances were the direct result of the rejection by the Prime Minister of Pakistan of an ultimatum to declare the Qadiani Ahmadis as a non-Muslim minority. Recently, the Ahmadis in Pakistan have been declared a non-Muslim minority.

²⁸ PLD 1957 SC 9.

orderly and convenient manner.....Nevertheless such a construction would afford no warrant for such an exercise of legislative power, as under the pretence and colour of regulating, should subvert or injuriously restrain the right itself".²⁹

Subject to the limitations imposed by Article 41, any religious denomination has the freedom to manage its institutions in conformity with its own tenets:

"A religious denomination enjoys complete autonomy in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters."³⁰

But the Court has the right to determine whether a particular religious rite or observance is regarded as essential according to the tenets of that religion.³¹

A religious denomination has the untrammelled power to spend the income of property owned by itself. When a testator or donor declares a trust to be used by a religious denomination for religious and charitable purposes and set out the objects in the trust instrument or the deed, a law empowering the Charity Commissioner to divert the income of the trust property to other purposes was held to contravene the provisions of Article 26(b) of the Indian Constitution, corresponding to Article 41(b), as an encroachment on its freedom to manage its religious affairs.³²

In *Muhammad Mehdi Ali Khan v. Province of East Pakistan*³³ vigorous contentions were raised by the government that the words "religious institutions" used in Article 18 of the Constitution of Pakistan, 1956 did not include *wakf-al-al-aulad*, *wakf* or *debutter* and these words had to be read with reference to its context "every religious denomination and the sect thereof" which indicated that "religious institution" in the Article contemplated religious institutions of a public character in which a denomination or a sect thereof was interested. A public *wakf* where

²⁹ *Copin v. Foster*, 12 Pick 485.

³⁰ *Commissioner v. Swamiar*, AIR 1954 SC 282.

³¹ *Durgah Committee v. Hussain*, AIR 1961 SC 1402.

³² *Ratilal v. State of Bombay*, AIR 1954 SC 388.

³³ PLD 1958 Dacca 203.

the property is dedicated exclusively for public purposes and public charity might be protected under Article 18, corresponding to Article 41 of the Constitution of Bangladesh.

In holding that *wakfs* including *wakf-al-al-aulad* are religious institutions, Chowdhury J, of the Dacca High Court, said:

"There is no doubt that the framers of the Constitution while using the expression, "religious institution," used it in the same sense as understood by the citizens of Pakistan under their personal law, and not in the technical sense of English law where charity has got a meaning different from a charity, *sadakah*, under the Muslim Law or Hindu Law and, by the expression "every religious denomination and every sect thereof" used by them, they mean every member of a religious denomination and every member of the sect thereof. They either individually or collectively will have the right to establish, manage and maintain their religious institutions. Otherwise, the word, "establish" with reference to religious institutions will mean a religious institution established by a religious denomination as a whole and not by an individual of such denomination. The absurd result that would follow would be that if any individual of a religious denomination establishes a wakf, though public in character, it will not be protected under Clause (b) of Article 18 of the Constitution, as it is not established by the religious denomination itself.....

Akbar J, however, differed with the above views of Chowdhury J and said "... the dedications for the benefit of children and family contained in these *wakfs* (that is, *wakfs-al-al-aulad*) are not protected by Article 18 (b) of the Constitution and can be acquired under the East Bengal State Acquisition and Tenancy Act, 1950." The reasons advanced by him were that "Article 18 (b) as it stands, discloses an intention on the part of the Constitution-makers to restrict the exemption, for which it provides, to such religious institution in which a religious denomination has interest in the maintenance and management."

He further said that the Constitution-makers did not intend that every human activity connected with religion should be protected. In his opinion only "the question of faith and belief is protected by Article 18(a) and Article 18(b) protects an organisation of the sect in pursuance of that belief". The right guaranteed under Article 18(a), he said, is an individual right whereas the right guaranteed under Article 18(b) is a collective right of a religious denomination. He failed to see how a *wakf*-

al-al-aulad which was a dedication substantially for the benefit of the *wakif's* family could be protected under Article 18(b) which contemplates establishment of certain organisation by the religious denomination in accordance with their faith.

On the re-hearing of the case before Ispahani J the learned judge, however, agreed with the views expressed by Choudhury J and held that *wakfs*, including *wakfs-al-al-aulad*, were religious institutions within the meaning of Article 18 of the Constitution.

Freedom of Religion in Educational Institutions

Clause (2) of Article 41 provides that no person attending any educational institution, shall be required to receive religious instruction or participate in any religious ceremony or worship if such instruction, ceremony or worship does not relate to his own religion. It is implied that he may have to submit to such instruction, ceremony or worship if they are concerned with his own religion. As the term 'religion' has not been defined, difficulty may arise as to its meaning. In every religion there are sects and subsects and each of them though coming under the same religion, have their distinct cores, beliefs and forms of worship. For, example, in Islam there are the two main sects, Sunni and Shia besides other sub-sects under each of them. Similarly, Christianity includes the Roman Catholics and Protestants as well as other groups and Hinduism is practised by Brahmins and non-Brahmins who are sub-divided into various other groups. It would, however, be obvious that the court would answer in the negative the question whether a Sunni Muslim could be compelled to receive instruction in Shia doctrines but it is not so apparent if a Sunni Muslim belonging to the Hanafi school may have to submit to the teaching of any of the remaining four schools. However, the problem is still academic and needs no further consideration at the present moment.

The corresponding Article 28 (3) of the Indian Constitution are not exactly the same as the above provisions. The Indian provisions refer only to educational institutions receiving aid from the State, whereas Clause (2) of Article 41 of the Constitution

of Bangladesh includes 'any educational institution' whether aided by the State or not. Next, a person attending an educational institution in Bangladesh may have to receive, or take part in instruction, ceremony or worship of his own religion but whether he can be compelled is not yet known. In India, such a person, if major, shall not be compelled if he is unwilling, or if minor unless his guardian consents. Further, Article 28 (1) of the Indian Constitution expressly mentions that no religious instruction shall be provided in any educational institution wholly maintained out of state funds.

With these provisions in the Indian and Bangladesh Constitutions may be contrasted one or two decisions of the American Supreme Court on the interpretation of the 'freedom of religion' clause of the First Amendment to the United States Constitution.³⁴ In *McCollum v. Board of Education*³⁵ the facts were that under a "released time" programme, religious instruction was to be given in the schools to students whose guardians signed "request cards". During regular school hours classes were to be held in the school building by teachers supplied by a religious council, subject to the approval of the Superintendent of Schools. Students who were unwilling to receive such instruction could pursue their regular secular studies. The Supreme Court could not uphold the use of the State's compulsory public school machinery supported by the State's tax for dissemination of religious doctrines.

However, in *Zorach v. Clauson* the Supreme Court upheld a New York City "released time" programme according to which religious instruction was to take place off the school premises. Delivering the opinion for the majority, Justice Douglas said:

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the

³⁴ "Congress shall make no Law respecting an establishment of religion.... or prohibiting the free exercise thereof."

³⁵ 333 US 203 (1948) A state Act which required the parent to send their children to public schools only was unanimously held as unconstitutional in *Pierce v. Society of the Sisters* etc., 268 US 510 (1925). Children, said the Court, are not mere creatures of the State.

spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or co-operate with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.”

Clause (3) of Article 28 of the Constitution of Bangladesh provides that no citizen shall, on ground only of religion be subjected to any disability, liability, restriction or condition with regard to admission to any educational institution. But the State may provide specially for the advancement of educationally backward section of citizens.

A citizen who has not the qualifications necessary for entering an educational institution cannot invoke the present clause. But if he has the requisite academic qualifications, he cannot be denied admission on the ground mentioned in the clause.

‘Citizen’ does not mean a citizen of the minority group as opposed to the majority group but means every citizen. The language of Article 28 is wide and unqualified and covers all citizens whether they belong to the majority or the minority group.³⁶

³⁶ *State of Bombay v. Bombay Education Society*, AIR 1954 SC 561.

CHAPTER NINE

RIGHTS TO EQUALITY

Concepts of the Equality Before the Law and the Equal Protection of Law:

Article 27 guarantees every citizen's right to equality before the law and the equal protection of the laws.¹ The corresponding Article 14 in the Indian Constitution did not, it may be noted, confine these rights to citizens merely but extended them to every "person" residing in India.

Equality before the law is a concept in English Constitutional law. Every modern State has at least theoretically accepted the principle of equality before the law and its acceptance is found in the specific provisions of the most written constitutions.

The clause "equal protection of law" has been imported from the Fourteenth Amendment to the United States Constitution. It was inserted there for the benefit of the freed Negroes. In 1886, however, in the famous case of *Yick Wo v. Hopkins*² it was applied to protect the Chinese residents in the United States of America. There also, as in Bangladesh, the protection of this clause can be claimed by any "person".

The equal protection clause does not, of course, negative the idea of legislative classification as, indeed, most of the legislation

¹ This Article corresponds to Article 5 of the Constitution of Pakistan, 1956 and Fundamental right No. 15 of the Constitution of Pakistan, 1962.

² 118 US 356 (1886). The problem whether the use of the word "person" in the Fourteenth Amendment was intended to include corporations was raised as early as 1885 in *San Mateo County v. Southern Pacific R. R. Co.*, 116 US 138 (1885) but was not decided. In *Santa Clara County v. Southern Pacific R.R. Co.*, 118 US 394 (1886) it was held that "person" includes corporations.

to-day applies to special groups or classes involving classification of some sort or other.

The idea of equality before the law as developed in the liberal tradition of the nineteenth century in England is one of the aspects, according to Dicey, of the doctrine of the Rule of Law. The same doctrine, however, led to the development of the principle of economic equality which challenged the unequal distribution of wealth. But the principle of equality did not, in Sir Ivor Jennings' view, imply equal distribution of property or application of the same laws to all persons. Criticising Dicey's view of the principle as an aspect of the rule of law, Sir Ivor Jennings says that by "equality" Dicey did not actually mean equality. "For equality before law in its most obvious sense means an equality of rights and duties. In this sense there is no equality."³ He refers to pawnbrokers, moneylenders, landlords and other groups having special rights and duties and says that it is not

"possible to affirm that equality exists because any person can legally join one of these classes. A man cannot become a married woman or an infant; nor can anyone become a licensee of a public-house or a film exhibitor without the consent of someone else."

He also attempted to refute Dicey's suggestion that the ideas of legal equality or of the universal subjection of all classes to one law administered by the ordinary Courts and meant that in England every man from the Prime Minister down to a Constable was "under the same responsibility for every act done without legal justification as any other citizen." In the opinion of Sir Ivor Jennings, the notion of equality before law is much more restricted.

"It assumes that among equals the laws should be equal and should be equally administered, that likes should be treated alike. The right to sue and be sued, to prosecute and be prosecuted, for the same kind of action should be the same for all citizens of full age and understanding and without distinction of race, religion, wealth, social status or political influence."⁴

³ *The Law and the Constitution*, 5th Edition, p. 295.

⁴ *Ibid.*, p. 49. In *Satwant Singh v. D. Ramarathnam*, AIR 1967 SC 1836, it was observed by the Indian Supreme Court that "the doctrine of equality

In other words, in English law the conception of equality before the law generally implies that the law should not discriminate between persons on account of class, race or religion.

As an eminent writer has observed, the rule of law doctrine insofar as it subjects everyone equally to general laws which are administered by an independent tribunal is not only based on a procedural concept but has its substantive aspect too.⁵ According to him the equal rule of law, as Dicey expounded it, has at least one substantive requirement.

"It must not permit overwide powers of discretionary action to be conferred on officials. It prescribes also a requirement of equal access and subjection of all private and public persons to the same judicial tribunals."⁶

Some of the decisions of the United States Supreme Court illustrate the principle underlying the clause "equal protection of law." It has not always been possible to enforce this principle without resistance from the American public as was witnessed by the Little Rock Incident in the State of Arkansas.⁷ This incident followed on a public announcement of the Board of Education of the City of Little Rock intended to comply with the unanimous decision of the United States Supreme Court that "separate educational facilities (on a racial basis) are essentially unequal" and that the persons against whom such restrictions are

before the law is a necessary corollary to the high concept of the rule of law accepted by the Indian Constitution".

⁵ Geoffrey Marshall, *Constitutional Theory*, p. 138 (1971)

⁶ *Ibid.*

⁷ 'A Government Lawyer Looks at Little Rock' by Warren Olney in "*California Law Review*", Vol. 45 No. 4, Oct. 1957. As is well known, in spite of President Eisenhower's Proclamation calling on the mob to cease and desist from its obstruction at the School and to disperse forthwith, people still gathered in front of the school, obviously with intent to prevent the Court's order relating to the admission of Negro students to the Little Rock Central High School from being enforced. Pursuant to the President's Executive Order, "Providing Assistance for the Removal of the Obstruction of Justice within the State of Arkansas", a unit of the armed forces was sent to Little Rock and Arkansas National Guard was federalized at the same time. With the minimum of incident, the mob was dispersed, and the Negro students entered the school under the protection of the soldiers.

enforced are thereby deprived "of the equal protection of the laws guaranteed by the Fourteenth Amendment."⁸ The reasons for the decision were made quite explicit in the judgment:

"To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status. In the community that may affect their hearts and minds in a way unlikely ever to be undone.....we conclude that in the field of education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal."

It should be explained that the "separate but equal" formula was earlier held in *Plessy v. Ferguson*⁹ to satisfy the constitutional requirements of equal protection of the laws. The judgment declared that it was reasonable for a state to require, in the interest of minimising occasions for race friction, that white and coloured persons travelling by rail be assigned separate coaches, the quality of the accommodation afforded the two races being substantially equal. The same formula was later extended to public educational institutions.

The first authoritative interpretation on Article 14 of the Indian Constitution was given by the Indian Supreme Court in *Chiranjit Lal v. Union of India*.¹⁰ The petitioner, who was a shareholder of the Sholapur Spinning and Weaving Co., Ltd., challenged the validity of the Sholapur Spinning and Weaving Co., (Emergency Provisions) Act, 1950, which enabled the government to take possession of and control over the mills of the Company, on the grounds that it infringed fundamental rights to property and the right to equal protection of the laws guaranteed by Article 14. The Supreme Court upheld the legislation as reasonable as it related to a company which was engaged in production of a commodity vitally essential to the community.

Fazl Ali J expressed complete agreement with Professor Willis' definition of the equal protection of the laws. Professor Willis stated:

"The guarantee of the equal protection of laws means the protection of equal laws. It forbids class legislation, but does not forbid

⁸ *Brown v. Board of Edn.*, 347 US 453 (1954).

⁹ 163 US 537 (1896).

¹⁰ AIR 1951 SC 41.

classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited, either in the objects to which it is directed or by the territory within which it is to operate..... It does not take from the states the power to classify either in the adoption of public laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullified what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification the existence of that state of facts must be assumed. One who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis.....A law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it.”¹¹

In a later case¹² decided by the Supreme Court in the same year, Section 39 of the Bombay Prohibition Act, 1949, which provided that “the Provincial Government may permit the use or consumption of foreign liquor on cargo boats, warships and troopships and military and naval messes and canteens” was impugned as infringing the principles of equality as it arbitrarily and capriciously selected certain bodies or groups or people for favoured treatment while subjected the petitioner and other citizens to the general provisions of the Act.¹² The Supreme Court, however, did not find anything wrong *prima facie* in the legislature according special treatment to persons who formed a class by themselves in many respects and who had been treated as such in various enactments and statutory provisions. Fazl Ali J, in his judgment, summarised the principles enunciated on the meaning and scope of Article 14 in *Chiranjit Lal v. Union*;

1. The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its determinations are based upon adequate grounds.

¹¹ *Constitutional Law*, 1st Edition, at p. 579.

¹² *State of Bombay v. Balsara*, AIR 1951 SC 318.

2. The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.
3. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.
4. The principle does not take away from the state the power of classifying persons for legitimate purposes.
5. Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.
6. If a law deals equally with members of a welldefined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.
7. While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis.¹³

Article 27 of the Constitution is directed against both legislative and executive organs of the State including all subordinate authorities.¹⁴ In determining whether the impugned statute has violated this Article, it is necessary to ascertain the policy and object behind the statute.¹⁵ The Legislature is competent to validate procedural defects.¹⁶ It has the power to make a special law to attain particular object and for that purpose classify persons, objects or transactions upon which the law is intended to operate.¹⁷ There is no abstract standard or general

¹³ AIR 1951 SC 41. *Ram Krishna Dalmia v. Justice S. R. Tendolkar* AIR 1958 SC 538; *Jyoti Prasad v. Administrator, Union Territory of Delhi*, AIR 1961 SC 1602.

¹⁴ *Ganga Ram v. Union of India*, AIR 1970 SC 2178.

¹⁵ *Kangashri v. State of West Bengal*, AIR 1960 SC 457.

¹⁶ *State of Mysore v. D. Achiah Chetty*, AIR 1969 SC 477.

¹⁷ *State of Madhya Pradesh v. Bhopal Sugar Industries Ltd.*, AIR 1964 SC 1179; *Northern India Caterers Ltd. v. State of Punjab*, AIR 1967 SC 1581.

pattern of reasonableness. The reasonableness of an impugned statute must be judged after taking into consideration the nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied, the disproportion of the imposition and the prevailing conditions at the time.¹⁸ The Legislature must be conceded some elasticity in making a classification between persons, objects and transactions.¹⁹ A legislation would not be discriminatory if certain categories which stood on the same footing are not covered by it. It is for the legislature to determine which categories it will include within the scope of the legislation.²⁰

Although a law may be perfectly valid and did not offend against Article 27, an officer in administering the law may be acting contrary to the provisions of that Article. A clear distinction must be borne in mind between the law and the administration of the law. If the law itself permitted discrimination, even though the law appeared to be fair and undiscriminatory, the Court would interfere and say that it was more concerned with how the law actually worked, rather than how it appeared in black and white in the statute book. But when a specific act of an individual officer was challenged as being in contravention of Article 27, it might be found that the officer was, in acting contrary to law, not conforming with this Article. The Court is not powerless to give the subject protection against dishonest officer, but, is unable to give it under Article 27 or Article 102 of the Constitution.²¹ Arbitrariness by an officer is more subversive of the doctrine of equality than statutory discrimination.²² Where the law vests a discretion in an authority and clothes it with unguided and arbitrary powers enabling it to discriminate, it offends the guarantee of equal protection.²³ Every breach of

¹⁸ *Mineral Development Ltd., v. State of Bihar*, AIR 1960 SC 468; *A. H. Qureshi v. State of Bihar*, AIR 1961 SC 448.

¹⁹ *Rustom v. Union of India*, AIR 1970 SC 1318.

²⁰ *Sakhawat Ali v. State of Orissa*, AIR 1955 SC 166.

²¹ *Dhanraj Milla v. B. K. Kocher*, AIR 1951 Bom 132.

²² *State of Andhra Pradesh v. Nalla Raja Reddy*, AIR 1967 SC 1458.

²³ *Jyoti Prasad v. Administrator*, AIR 1961 SC 1602.

law by the Government may not, however, amount to a violation of the right to the equal protection of the laws.²⁴

The discretion of the Government to declare by notification that from a specific date all estates shall vest in it free from all encumbrances did not result in unjustifiable inequality of treatment. When a discretion was given to a responsible authority, no presumption could be drawn that it would be abused. As careful and elaborate administrative arrangements were to be made for the taking over of these estates and as presumably the Government was the best judge of the time at which all states in a particular area could be taken over, it was not unreasonable to confer on the Government ample authority to fulfil that object.²⁵ The classification of institutions based on religion, Hindu, Mohammedan or Christian is neither arbitrary nor unreasonable having regard to the object sought to be obtained, viz., the better administration and management of such institutions.

Article 27 does not prevent the legislature from taking up one set of institutions for legislative consideration at one time and enacting laws in respect of them reserving the other types of institutions for consideration to a future date.²⁶ The provisions of the Bombay Sales Tax Act, 1952, fixing Rs. 3,000 and Rs. 5,000 as the minimum taxable turnover for general tax and special tax, were impugned as discriminatory and, therefore, void under Article 14. After a consideration of the object behind the legislation which was that the State might not consider it administratively worthwhile to tax sales by small traders who had no organisational facilities for collecting the tax from their buyers and turn it over to the Government, the Supreme Court of India held that no discrimination was involved in such classification.²⁷

²⁴ *State of Jammu and Kashmir v. Gholam Rasool*, AIR 1961 SC 1301.

²⁵ *Suryapal Singh v. U. P. Government*, AIR 1957 All. 674. While in the case of enacted law one knows where he stands, in the case of unchanneled executive discretion, the possibility of discrimination being unpredictable is greater, *Satwant Singh v. D. Ramarathnam*, AIR 1967 SC 1836.

²⁶ *L. T. Swamiar v. Commissioners, Hindu Religious Endowments Madras*, AIR 1954 SC 282.

²⁷ *State of Bombay v. United Motors Ltd.*, AIR 1953 SC 252.

Order 37 of the Civil Procedure Code was assailed as making difference between defendants in ordinary suits and defendants in suits based on negotiable instruments. The fact that Order 37 did not apply to all courts in the land did not *ipso facto* make it unconstitutional under Article 14. The comparison between the defendants in the two classes of suits was not a comparison between similarly circumstanced individuals. Further, courts in India, as in Bangladesh, were necessarily graded, and with varying jurisdictions, powers and procedures and not all procedure for trial and appeal were common.²⁸

Section 197 of the Criminal Procedure Code which requires that previous sanction of the Government has to be obtained before a prosecution against a government servant can be started by a private citizen, may not be declared unconstitutional as infringing Article 27 on the ground of necessity for the protection of government servants against unnecessary harassment.²⁹

"Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard.....There is no question of any discrimination between one person and another in the matter of taking proceedings against a public servant for an act done or purporting to be done by the public servant in the discharge of his official duties. No one can take such proceedings without such sanction. If the Government gives sanction against one public servant but declines to do so against another, then the Government servant against whom sanction is given may possibly complain of discrimination. But the petitioners who are complainants cannot be heard to say so for there is no discrimination as against any complainant."³⁰

It was further observed that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the government and not in a minor official. A law may be constitutional under Article 27 even though it relates to a single individual, family or corporation.³¹ While the Article prohibits discriminatory

²⁸ *Ambalal v. Jawalal*, AIR 1953 Cal 758.

²⁹ *Matajog Dobey v. H. C. Bhari*, AIR 1956 SC 44.

³⁰ *Ibid.*

³¹ *Chiranjit Lal v. Union*, AIR 1951 SC 41.

legislation which aims at one individual or class of individuals, it does not forbid reasonable classification.³² But whether it would apply to a particular case would depend upon the facts and circumstances of that case.³³

In singling out two groups of persons consisting of two ladies and their children out of those who claimed to be related to the late Nawab Waliuddowla, a nobleman of Hyderabad, and in preventing them from establishing their rights under the personal law which governed the community in courts of law, the impugned Act (Waliuddowla Succession Act, 1950) was discriminatory. There was no rational or reasonable basis for the discrimination and so the Act contravened the provisions of Article 14. Mukherjee J, in delivering the unanimous judgment of the Supreme Court, said:

It is not suggested that it was for serving a public purpose or securing some advantage to the community as a whole that the legislature chose in this case to interfere with private rights. The only purpose of the legislation, as appears from the preamble, was to end certain private disputes... The continuance of a dispute even for a long time between two sets of rival claimants to the property of a private person is not a circumstance of such unusual nature as would invest a case with special or exceptional features and make it a class by itself justifying its differentiation from all other cases of succession disputes... The dispute regarding succession to the estate of the Nawab was a legal dispute pure and simple and without determination of the points in issue by a properly constituted judicial authority and made applicable to specific individuals, who are deprived thereby of valuable rights which are enjoyed by all other persons occupying the same position as themselves, does in our opinion plainly come within the constitutional inhibition of Article 14."³⁴

In *Chiranjit Lal's* case, the legislation, though it related to a company, was upheld as constitutional, because the circumstances in that case were somewhat exceptional and in judging the reasonableness of the classification the Court looked at the social, political and economic interests of the community as a whole.

³² *Lachman Das v. State of Punjab*, AIR 1963 SC 222.

³³ *Ameerunnissa Begum v. Mahboob Begum*, AIR 1953 SC 31.

³⁴ *Ibid.*

In 1957, certain provisions of the East Bengal State Acquisition and Tenancy Act, 1950 which enabled the Government to acquire by notification all rent-receiving interests in land specified therein and also empowered the Government to acquire in a similar manner the khas lands of such rent-receivers were challenged before the Dacca High Court as violative of the equality clause in the Constitution of Pakistan, 1956. Provisions of the same Act which allowed compensation to the expropriated rent-receivers on a sliding scale were also impugned. In holding that the impugned provisions were not discriminatory, Amin Ahmed CJ observed:

“Equal protection of law does not necessarily mean “equal protection of equal law.” The law may be the same and if it is the same, it should be equally enforced in respect of all who are alike but if the law is unequal it should nevertheless be enforced in the same way in case of persons who are different, that is to say, among those who belong to different classification. In case the law is unequal, it must have a rational basis. Although discrimination among the members of the same class or category *inter se* may not be always permissible, discrimination between members of one class and those of another class may be permissible or may even be desirable provided there are reasonable grounds for doing so”³⁵.

In dismissing the appeal against the decision, the Supreme Court expressed its reluctance to accept the proposition that the expression “equal protection of law” meant equality of operation of legislation upon all citizens of the state.³⁶ It also expressed its inability to lend an unqualified support to the frequently stated generalisation that the guarantee to the equal protection of the laws requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. The Court drew attention that

“In the application of these principles, however, it has always been recognised that classification of persons or things is in no way

³⁵ *Jibendra v. Province of East Pakistan*, PLD 1957 Dacca 1.

³⁶ *Jibendra v. East Pakistan*, PLD 1957 SC 9 ; in *Golam Sarwar Molla v. Election Tribunal*, PLD 1965 Dac 86 this decision was relied upon to uphold the provisions of election laws and in *Nazir Begum v. Prov. of West Pakistan*, PLD 1966 Lah 195 it was applied to uphold the different licensing systems for different types of contract.

repugnant to the equality doctrine provided the classification is not arbitrary or capricious, is natural and reasonable and bears a fair and substantial relation to the object of legislation.....A classification that proceeds on irrelevant consideration such as differences in race, colour or religion will certainly be rejected by the courts.”³⁷

Certain provisions of the Foreign Exchange Regulation Act were held repugnant to constitutional prohibition against discrimination and the convictions and sentences passed on the appellants were set aside.³⁸ The appellants, who were exporters of fish from Pakistan to India, did not, as required by the Act, repatriate the sale proceeds to Pakistan. Section 22 (a) of the Act expressly provides that a person accused of contravention of the Act may be proceeded against under the ordinary law, or before a tribunal or before an Adjudication Officer. The Act contains no indication as to which classes of cases are to go before any one of them, and it does not impose upon the Government the obligation to classify cases, or confer upon it the power of making rules with a view to classifying the cases to be tried by each of these tribunals. It confers discretion of a very wide character upon stated authorities, to act in relation to subject matter falling within the same class in three different modes varying greatly in severity. Munir CJ observed:

“The scope of the unguided discretion so allowed is too great to permit of application of the principle that equality is not infringed by the mere conferment of unguided power but only by its arbitrary

³⁷ *Ibid.*

³⁸ *Waris Meah v. The State*, PLD 1957 SC 157; In repelling the contention that rule 3 of the West Pakistan Criminal Law Amendment Rules, 1963 gave an unfettered discretion to the Commissioner to pick and choose at his own sweet will, from among cases involving the commission of scheduled offences, any case he wishes to refer to a tribunal set up under the Act leaving other cases of the same nature to be tried by the ordinary court and was, therefore, violative of the equality clause Anwarul Huq J said that “the Legislature cannot be expected to lay down a scientifically perfect classification and that discretion has necessarily to be given to the statutory functionaries” who are to operate the statute. As long as the legislative intent and policy is clear and standards have been laid down for the guidance of the executive authorities, no exception can be taken to the trial of specific cases before the special forum. *Sohbat Khan v. The State*, PLD 1966 Pesh 210.

exercise. For, in the absence of any discernible principle guiding the choice of forum among the three provided by the law, choice, must always be arbitrary to a greater or less degree".³⁹

The validity of two circulars issued by the Central Ministry of Health was questioned. Sixty-five seats out of 130 in Dow Medical College at Karachi were to be reserved for candidates from North-West Frontier Province, Sind, and East Pakistan (as it then was), and for children of Central Government servants, for foreign nationals and for applications officially forwarded. Such reservation was not based on a reasonable classification, though reservation for candidates from North-West Frontier Province and Sind could be justified for a few years as they had not yet fully established Medical Colleges.⁴⁰ A rule of the University, which required candidates to answer examination papers either in English or Urdu was perfectly reasonable, and Sindhi-speaking students could not complain of discrimination.⁴¹ If the Government appoints a Committee to select students for admission to any educational institution and lays down definite criteria for making the selection, it does not offend Article 27.⁴² The validity of Section 8 of the Frontier Crimes Regulation, which empowered the Deputy Commissioner to refer a dispute to a Council of Elders if he is satisfied that it might cause bloodshed or it is between parties belonging to a frontier tribe was challenged on the ground of introducing racial discrimination because it applied to Pathans and Baluchis only, by virtue of Section 1, and was, therefore, as open to the same criticism as discrimination between a Negro and a white man. Kayani J observed that 'Equal protection clause reduced itself to the problem of classifying people who are placed in 'equal' or similar circumstances in respect of some object which the legislature finds necessary to accomplish with reference to the needs of a particular

³⁹ *Ibid.*

⁴⁰ *Abdul Wadood v. Pakistan*, PLD 1957 Kar 740; *Chitra Ghosh v. Union of India*, AIR 1970 SC 35; *Naseem Mahmood v. Principal, King Edward Medical College*, PLD 1965 Lah 272

⁴¹ *Muhd. Hussain Asani v. University of Karachi*, PLD 1957 Kar 611

⁴² *Chitralakha v. University of Mysore*, AIR 1964 SC 1823.

situation".⁴³ A classification on the basis of birth was obnoxious and could not stand the test of the principles embodied in Article 27. If, in a particular territory within the country there existed and continued to exist conditions, circumstances and peculiarities, which were characteristic of the population of that territory a classification is reasonable and bears a fair and substantial relation to the object of the legislation.⁴⁴ If classification on territorial or geographical basis has a reasonable relation to the object aimed to be achieved, it is not forbidden.⁴⁵

The provisions of the Punjab Control of Goondas Act, 1951 were challenged as repugnant to the equality clause in Article 5 of the Constitution of Pakistan, 1956 as being a discriminatory piece of legislation providing an arbitrary, alternative procedure to that set out in Sections 107-110 of the Code of Criminal Procedure (the so-called preventive sections) against certain classes of persons.⁴⁶ It was held that the Act was not *ex facie* discriminatory, as the consequences of action under the Act were not identical with those envisaged in relevant sections of the Criminal Procedure Code, though in part they seemed to overlap. Grounds on which a person could be declared a goonda or a dangerous goonda (under the impugned Act) were not coincident with those justifying the demand of security for keeping the peace or for good behaviour from a person under the Criminal Procedure Code, nor did it lead to similar results in the matter of prohibitive action. If, however, in its actual working, discrimination was exercised against an individual, there might be cause of action for appropriate relief.

The contention that the Sind Land Revenue Code was discriminatory because no reasonable ground existed for the

⁴³ *Khan Abdul Akbar Khan v. Deputy Commissioner*, PLD 1957 Pesh 100.

⁴⁴ *Bahram Khan v. The State*, PLD 1957 Kar 709; *Toti Khan v. District Magistrate*, PLD 1957 Quetta 1; *Dosso v. The State*, PLD 1957 Quetta 9; *Muhammad Akbar v. Political Agent*, Quetta PLD 1957 Quetta 12; *Md. Usman v. The State*, PLD 1965 Lah 229.

⁴⁵ *Joshi v. Madhya Bharat*, AIR 1955 SC 334; *Kishan Singh v. Rajasthan*, AIR 1955 SC 795; *Pandurang Rao v. Public Service Commission*, AIR 1963 SC 268; *Gopal Narayan v. State of Uttar Pradesh*, AIR 1964 SC 370.

⁴⁶ *Bazal Ahmed Ayyubi v. West Pakistan Province*, PLD 1957 Lah 388.

continuance of different land revenue system in the new Province was unacceptable to the Court. The averments in the petition alleging the comparative advantages or disadvantages of the different systems of land revenue in different parts of the province were too sketchy and that as the petitioner could not discharge the burden of proof resting on him to establish that uniform circumstances did not exist throughout the province, it was unable to hold that there was no reasonable ground for this classification.⁴⁷ Unreasonableness of a rule must be specifically pleaded and proved by the person who challenges it as discriminatory.⁴⁸ An applicant must not only plead that Article 27 has been violated because he has received unequal treatment, but there was no reasonable basis for a differential treatment.⁴⁹

The provisions of the District Board Electoral Rules, 1955, which, for the purposes of election to the District Board, divided the electorate of the district on the basis of sex, were impugned as discriminatory against the women.⁵⁰ The question that confronted the Court was whether there could be a classification based on sex in the matter of suffrage. The Court recognised that a classification based on sex might, in the context of special protection required by women while employed in certain trades or professions, be reasonable but held that the impugned rules did not appear to proceed on any rational principle. Further, it could not be said that the delimitation of constituencies according to the Electoral Rules had a reasonable or direct connection with the supposed objective aimed at, that is, special protection of women. The constitutional guarantee of equal protection was held to extend to political rights, such as the right to vote or stand for elections. If the test for judging the validity of such legislation by the consideration whether it could benefit the community as a

⁴⁷ *Seth Tanumal v. Province of West Pakistan*, PLD 1957 Kar 921; *V. S. Rice & Oil Mills v. State of Andhra Pradesh*, AIR 1964 SC 1781; *Ajoy Kumar v. Local Board*, AIR 1965 SC 1561.

⁴⁸ *State of Uttar Pradesh v. Kartan Singh*, AIR 1964 SC 1135; *Jalan Trading Co. v. Mill Mazdoor Sabha*, AIR 1967 SC 691; *Smith v. Cardiff Corpn.* (No. 2) (1955) Ch. 159.

⁴⁹ *Prabhudas v. Union of India*, AIR 1966 SC 1044.

⁵⁰ *Parveen Zohra v. Province of West Pakistan*, PLD 1957 Lah 1071.

whole or not were adopted all discriminatory legislation to the prejudice of any particular class would have to be adopted.

The legality of certain prosecutions started under the Control of Shipping Act, 1947, were challenged by the partners of a firm carrying on shipping business in Karachi.⁵¹ On the authority of *Jibendra Kishore v. East Pakistan*⁵² it was held that if the Act was not *ex facie* discriminatory, the petitioners were, in order to establish a right to relief, clearly under an obligation to show that the Shipping Authority had acted in a partial, unjust and oppressive manner, but they did not allege that the authority was functioning in a discriminatory manner. The Act proceeded on a definite policy, namely, the policy of placing the ships, for the period of the emergency, substantially at the disposal of the Government to enable it to direct what classes of cargo or passengers might be carried, to claim priority to Government cargo and passengers to fix rates and freights and to know the exact position of a Pakistan ship at a particular time so that if any emergency arose it could be called back for home service. This policy could successfully be carried out only if full powers which could not be controlled by rules were given to the Shipping Authority and the licensing system contemplated by the Act was merely a means for the Shipping Authority to requisition shipping space to satisfy urgent and exceptional trade needs of the country. In the opinion of Cornelius J,

“It cannot be said that by leaving discretion to the Shipping Authority, he is given the position of being a law unto himself in the sense that he can decide for himself in what conditions he will grant a permit or as the case may be, refuse a permit. There is no case of legislation at all since each case has to be considered *ad hoc* in relation to the circumstances existing when it arises in the light of the requirements of the State, and in compliance with the policy laid down. That degree of discretion is vested in the Executive inherently as a necessary condition of its existence”.

Equality was not violated by the mere conferment of vast powers or discretion on an officer in the absence of its arbitrary exercise by him. Only unauthorised delegation of legislative powers was bad.

⁵¹ *East & West Steamship Co. v. Pakistan*, PLD 1958 SC 63.

⁵² PLD 1957 SC 9.

The provisions of the Karachi Control of Disorderly Persons Act, 1952, were attacked as containing a procedure which was disadvantageous in comparison with the procedure of the ordinary law and it was argued that the different treatment on similar grounds meant legislative despotism which in ultimate analysis was, in relation to those matters, nothing more than the absence of reasonable classification and thus amounted to unlawful discrimination. Since the practices were enumerated in Section 12 of the impugned Act and formed a class by themselves, they did not contravene the equality clause of the Constitution.⁵³

Equality and Procedural Laws

Article 27 guarantees equal protection not only in respect of substantive laws, but procedural laws also come within its scope.⁵⁴ The reasonableness of a restriction is to be tested both from substantive and procedural aspects.⁵⁵ The Article condemns discrimination not only by a substantive law but also by a procedural law.⁵⁶ The classification may be permissible not only in respect of persons. The heinousness or seriousness of certain crimes may also require separate treatment and trial.⁵⁷ If there are two procedures one of which is more prejudicial than the other discrimination will result if the authority exercises the more prejudicial against some and not against the rest.⁵⁸ The corresponding Article 14 of the Indian Constitution came up for detailed consideration in a number of criminal cases involving both substantive as well as procedural portions of law.

In *State of West Bengal v. Anwar Ali*⁵⁹ the Indian Supreme Court decided that the West Bengal Special Courts Act., 1950,

⁵³ *Laiq Ahmad v. District Magistrate*, PI D 1958 Kar 92.

⁵⁴ *Meenakshi Mills v. A. V. Vishwanath*, AIR 1955 SC 13.

⁵⁵ *Maneklall v. M. G. Makwana*, AIR 1967 SC 1373.

⁵⁶ *Bidi Supply Co. v. Union of India*, AIR 1956 SC 479; *Babulal v. Collector of Customs*, AIR 1957 SC 877; *Budhon v. State of Bihar* AIR 1955 SC 191; *M. H. Qureshi v. State of Bihar*, AIR 1958 SC 731, *Motidas v. S. P. Sahi*, AIR 1959 SC 942.

⁵⁷ *Rahman Shagoo v. State of Jammu & Kashmir*, AIR 1960 SC 1.

⁵⁸ *Northern India Caterers Ltd. v. State of Punjab*, AIR 1967 SC 1581.

⁵⁹ AIR 1952 SC 75. The Act was entitled "An Act to provide for the speedier trial of certain offences" and the preamble declared that "it is

violated the principle contained in Article 14. The main departures under the Act from the procedure for criminal trials under the Criminal Procedure Code were the elimination of the committal procedure in sessions cases and the substitution of the procedure laid down in the Code for trial of warrant cases by the Magistrate, trial without jury or assessors, restriction of the Court's power in granting adjournments and dispensation of *de novo* trial on transfer of a case from one Special Court to another.

Fazl Ali J, in his judgment, said that the declaration in the preamble to provide for a speedier trial could not furnish a basis of classification, for, that would amount to reading into the Act something which it did not contain and also to ascribing to its authors what they never intended. The Act was a *verbatim* copy of the earlier Ordinance which was framed before the Constitution came into force and Article 14 could not be considered by those who enacted it as the Article was then non-existent. Secondly, in consequence of the Act, two procedures, one under the Act and the other under the Criminal Procedure Code existed side by side in the area to which the Act applied, thus, leading to anomalous results. Thirdly, the procedure established under the Act was less advantageous than that prescribed by the Criminal Procedure Code. Fourthly, the Act did not make any attempt to particularize or classify the offences or cases to which it was to apply. Fazl Ali J further observed that it would be dangerous to introduce a subjective test in applying Article 14 which laid down a clear and objective test, that Article 14 did not import the "due process" idea of the American Constitution, that the Act did not state that public interest and administrative exigency would provide the occasion

expedient to provide for the speedier trial of certain offences." Section 3 empowered the State government by notification to constitute Special Courts, and Section 4 provided for the appointment of Special Judges to preside over such Courts. Sub-section (1) of Section 5 provided "A Special Court shall try such offences or classes of offences or cases or classes of cases as the State Government may by general or special order in writing direct." Sections 6 to 15 prescribed the special procedure which the Court were to follow in the trial of the cases referred to it.

for its application, and that the Act in its application involved discrimination. In the opinion of Mahajan J,

“Speedier trial of offences may be the reason and motive for the legislation but it does not amount either to a classification of offence or cases. The necessity of a speedy trial is too vague, uncertain and elusive criterion to form the basis of a valid and reasonable classification..... Even if it be said that the statute on the face of it is not discriminatory, it is so in its effect and operation inasmuch as it invests in the executive government unregulated official discretion....”

The majority of the Judges in the Supreme Court held Section 5 (1) of the Act unconstitutional as it conflicted with Article 14.

Patanjali Sastri CJ, however, dissented and said that no discriminatory intent or design was discernible on the face of the Act and as the discretion vested in the State Government to refer to a Special Court for trial such offences or cases as might require speedier trial was expected to be exercised honestly and reasonably, the Act could not be declared invalid on the assumption that such authority would act arbitrarily in exercising the discretion.

In *Kathi Raning Rawat v. State of Saurashtra*⁶⁰, though the decision went the other way, most of the relevant considerations were the same as in *State of West Bengal v. Anwar Ali*. The jurisdiction of the Special Court of Criminal Jurisdiction which tried and convicted the appellant was challenged on the ground that an Ordinance (Saurashtra State Public Safety, Measures Ordinance, 1949) under which the Court was constituted was discriminatory.

Patanjali Sastri CJ said that as the State Government referred not to individual causes but to offences of certain kinds committed in certain areas and as the variations from the normal

⁶⁰ AIR 1952 SC 123. The Ordinance was passed “to provide for public safety, maintenance of public order and preservation of peace and tranquillity in the State of Saurashtra.” Section 7 to 18 dealt with establishment of Special Courts and the procedure to be followed. Section 9 empowered the State Government to constitute Special Judges, for such Courts. Section 11 enacted that the Special Judge “shall try such offences or classes of offences or such cases or classes of cases as the Government may by general or special order in writing direct.” Section 11 was in identical terms with Section 5 (1) of West Bengal Special Courts Act, 1950.

procedure authorised by the impugned ordinance were less disadvantageous to the persons tried before the Special Court than under the West Bengal Act, the objection as to discriminatory treatment could be more easily answered in the present case. He said :

“The impugned ordinance having thus been passed to combat the increasing tempo of certain types of regional crime, the two-fold classification on the lines of type and territory adopted in the impugned ordinance, read with the notification issued thereunder, is, in my view, reasonable and valid, and the degree of disparity of treatment involved is in no way in excess of what the situation demanded.”

In distinguishing the *West Bengal case*, Fazl Ali J said that the main objection to the Act impugned therein was that it permitted discrimination without reason or any rational basis while in the present case, one could discover a guiding principle in the Saurashtra Ordinance which had the effect of limiting the application of the special procedure to a particular category of offences only and establish such a nexus (which was missing in the West Bengal Act) between offences of a particular category and the object with which it was promulgated.

“The clear recital of a definite objective furnished a tangible and rational basis of classification to the State Government for the purpose of applying the provisions of the Ordinance and for choosing only such offences or cases as affect public safety, maintenance of public order and preservation of peace and tranquillity. He ruled out at the same time the propositions that “in no case and under no circumstances can a legislature lay down a special procedure for the trial of a particular class of offences, and that recourse to a simplified and less cumbrous procedure for the trial of those offences, even when abnormal conditions prevail will amount to a violation of Article 14.”

Mukherjee J, upholding the majority view, said that “if the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make a selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation.... In such cases, the power given to the executive body would import a duty on it to classify the subject-matter of legislation in accordance with the objective indicated in the statute.”

Mahajan J who along with Chandra Sekhara Aiyar and Bose JJ dissented from the above views held by the majority of the Judges, observed:

“Section 11 of the Ordinance, like Section 5 (1) of the West Bengal Act, suggests no reasonable basis or classification either in respect of offences or in respect of cases. It has laid down no measure for the grouping either of persons or of cases or of offences by which measure these groups could be distinguished from those outside the purview of the Special Act. The State Government can choose a case of a person similarly situate and hand it over to the special tribunal and leave the case of another person in the same circumstances to be tried by the procedure laid down in the Criminal Procedure Code.”

In *Lachmandas K. Ahuja v. The State of Bombay*⁶¹ a Special Judge was appointed by a notification issued under the Bombay Security Measures Act, 1947 and under Section 12 of the impugned Act, the State Government directed the Special Judge to try the case of the appellants who were implicated in the Central Bank Robbery case. A special procedure was laid down in the Act whereby the Special Judge could impose enhanced punishment, record only a memorandum of evidence, and exercise a discretion to summon defence witnesses.

It was canvassed that Section 12 of the Act which authorised the State Government to direct specific cases to be tried by a Special Judge offended Article 14 of the Constitution. The *West Bengal* and *Saurashtra* cases were cited in support of the argument. S.R.Das J, with whom the majority agreed, held that Section 12, which corresponded to Section 5 (1) of the West Bengal Act and Section 12 of the Saurashtra Ordinance, insofar as it authorised the government to direct particular cases to be tried by a Special Judge, was unconstitutional. In reply to the contention raised by the Attorney-General that Article 14 could not be invoked in regard to legal proceedings commenced before the Constitution came into operation, Das J had to distinguish the case of *Keshavan M. Menon v. State of Bombay*⁶² which held that the Constitution had no retroactive operation and that it did not affect rights acquired or liabilities incurred under laws.

⁶¹ AIR 1952 SC 235.

⁶² AIR 1951 SC 128.

which before the advent of the Constitution, were valid. He said that the only question there was whether a criminal proceeding instituted for a contravention of the provisions of the Indian Press (Emergency Powers) Act which amounted to a completed offence before the date of the Constitution could be continued after the Constitution came into force. No change in procedure was there involved. The observations in that case related to substantive rights acquired or liabilities incurred under the Act before the Constitution came into force. The procedure whereby the rights and liabilities would be enforced did not come up for consideration there, as the procedure adopted throughout was the same, namely, the procedure prescribed by the Code of Criminal Procedure.

So far as the instant case was concerned, the Act was valid in its entirety before the date of the Constitution and proceedings before Special Judge, before the Constitution came into force, regulated by this special procedure could not be questioned, however discriminatory it might have been, but the discriminatory procedure under the Security Measures Act, so less advantageous to the accused than the procedure under the Code of Criminal Procedure could not be continued after the date of the Constitution.

“If the consideration of the security of the State or the maintenance of public order requires the application of the ‘special’ procedure there is no obvious reason why it should be applied to “cases” already referred and not to cases not yet referred at the date of the Constitution. The same consideration applies equally to both categories of cases. It is, therefore, clear that there is no nexus which connects the basis on which the supposed classification is founded with the objects of the Act, for the object of the Act (viz. to consolidate, and amend the law relating to public safety, maintenance of public order and the preservation of peace and tranquillity in Bombay) is wide enough to cover both categories of ‘cases’. Therefore, it is not a permissible classification.”

In his dissenting judgment, Patanjali Sastri CJ said that the procedural variations brought about by the impugned Act were not so serious as to amount to a denial of the equal protection of the laws.

Both this decision and the *West Bengal* case were relied upon by the appellant in *Syed Qasim Rizvi v. The State of Hyderabad*⁶³

in challenging the validity of the Hyderabad Special Tribunal Regulation so far as its discriminatory provisions were concerned. Under the Regulation a Special Tribunal was constituted consisting of three members appointed by the Military Governor of the Hyderabad State. The Regulation provided that the Military Governor may, by general or special order, direct that any offence or class of offences should be tried by such tribunal, and the procedure for trial under the Regulation differed, to the prejudice of the person tried under it, from the provisions of the Hyderabad Criminal Procedure Code in material particulars. Counsel for the appellant contended that insofar as the procedure laid down in the Regulation departed from the ordinary law obtaining in Hyderabad, it abridged the rights of the accused and deprived him of benefits to which he would have otherwise been entitled, and so was discriminatory. As the Regulation conferred unfettered discretion on the Military Governor to direct cases to be tried by the Tribunal, without laying down any basis for classifications, for example, with regard to their nature or the area in which they were committed, the whole procedure was void according to the principles of the *West Bengal case*. Reliance was placed on *Lachmandas K. Ahuja v. State of Bombay* in support of the argument on behalf of the appellant that as the Constitution had not come into force when the trial was commenced and a portion of the trial had already been gone through prior to the 26th January, 1950, the date of the Constitution, the continuance of the procedure became void on and from that date.

The first question whether the procedure under the Special Tribunal Regulation was discriminatory in its character involved consideration of Article 14 with reference to it. Mukherjee J, in delivering the majority judgment, said that though some of the provisions of the impugned Regulation contravened Article 14, the Regulation must be valid for all past transactions and for enforcing rights and liabilities accrued before the Constitution came into force. Distinguishing the present case from the *West Bengal case*, he said that

“the impugned Regulation was in operation from long before the date of the Constitution. Section 3 of the Regulation, which is similar to

Section 5 (1) of the West Bengal Special Courts Act, might be in conflict with the provision of Article 14 of the Constitution, but as has been held by this Court in *Keshavan M. Menon's case*⁶⁴....such laws must be held to be valid for all past transactions and for enforcing rights and liabilities accrued before the advent of the Constitution. On this principle, the order made by the Military Governor, referring this case to the Special Tribunal, cannot be impeached and consequently the Special Tribunal must be deemed to have taken cognisance of the case quite properly, and its proceedings up to the date of the coming in of the Constitution would also have to be regarded as valid."

Mukherjee J could not accept the argument that if the provisions in the Regulation are found obnoxious to the equal protection clause any proceeding under it after the date of the Constitution must be totally invalid under Article 13 (1) of the Constitution, corresponding to Article 26 of the Constitution of Bangladesh. The accused had, in fact, substantially the benefit of a normal trial. In distinguishing *Lachmandas's case* from the present one, he said that the present question, namely as to whether after eliminating the discriminatory provisions in the statute it was still possible to continue the trial and secure to the accused substantially the benefits of a trial under the normal procedure, was neither raised nor considered. On the other hand, he observed that it was assumed throughout that it was not possible to proceed with the trial without following the discriminatory procedure and as that procedure became void on the coming into force of the Constitution, the jurisdiction of the Special Judge practically came to an end. He quoted Das J who delivered the majority judgment in *Lachmandas's case* as saying:

"Indeed in a sense the Special Judge's jurisdiction came to an end, for he was enjoined to proceed only according to the special procedure and that procedure having become void as stated above, he could not proceed at all as a Judge of a Special Court constituted under the impugned Act."

As the question raised in the present case was neither raised nor considered in *Lachmandas's case*, it could not be, according to him, an authority for the view taken here. He said:

"In cases of the type which we have before us where part of the trial could not be challenged as bad and the validity of the other part

⁶⁴ AIR 1951 SC 128.

depends on the question as to whether the accused has been deprived of equal protection in matters of procedure, it is incumbent upon the Court to consider, firstly, whether the discriminatory or unequal provisions of law could be separated from the rest and even without them a fair measure of equality in the matter of procedure could be secured to the accused. In the second place, it has got to consider whether the procedure actually followed did or did not proceed upon the basis of the discriminatory provisions. In our opinion, a mere threat or possibility of unequal treatment is not sufficient. If actually the accused has been discriminated against, then and then only he can complain, not otherwise.”

He expressed the opinion that it might not be possible to give the accused the substance of a trial according to normal procedure at the subsequent stage for two reasons. First, the discriminatory provisions might not be severable from the rest of the Act and consequently the Court would have no option but to continue the discriminatory procedure. Secondly, something might have been done at the previous stage which though not invalid at that time precluded the adoption of a different procedure subsequently. Thus, if the normal procedure were trial by jury or with the aid of assessors, and as a matter of fact there was no jury or assessor trial at the beginning, it would not be possible to introduce it at any subsequent stage. Similarly, having once adopted the summary procedure, it would not be possible to pass on to a different procedure at a later date. In such cases, the whole trial would have to be condemned as bad.

But as the facts in the present case were that the accused had substantially the benefit of a normal trial, though there were deviations in certain particulars from the normal procedure, the Regulation was upheld as valid.

Bose J, after reviewing the *West Bengal* case, *Saurashtra* case and *Lachmandas's* case, came to the conclusion that

“the true principle is that it is not setting up of special courts which matters, unless of course their composition is objectionable, but the procedure which they are directed to follow. If the special Judges are selected from a class of judicially qualified and experienced men of recognised impartiality and they are enjoined to follow a procedure which does not differ substantially from that of the ordinary courts, there can be no reasonable objection, but if the procedure deprived

the accused of substantial advantages which other accused similarly placed can demand, then Article 14 comes into play.”

He held that the Regulation conferred an unfettered discretion on the Military Governor to direct any case or cases to the Tribunal without laying down any basis for classification of the cases and it also contained discriminatory provisions which could not be separated from the good portions of the Regulation. In testing the validity of a law, what in fact is done under it is irrelevant. A law is either constitutional or not according to what it permits.

Ghulam Hasan J also held that the discriminatory provisions were not severable from the rest of the Regulation and the trial under the Regulation was void under Article 13 read with Article 14.

In *Habeeb Mohammad v. The State of Hyderabad*,⁶⁵ the Supreme Court of India applied its reasoning in *Qasim Razvi's* case to uphold the provisions of the Hyderabad Regulation which eliminated committal proceedings and substituted the warrant procedure for sessions procedure in the trial of offences.

The setting up of a Special Court under the West Bengal Criminal Law Amendment Act, 1949, was challenged before the Indian Supreme Court in the case of *Kedar Nath v. State of West Bengal*.⁶⁶ The appellants contended that the Special Court had no jurisdiction to try and convict them inasmuch as Section 4 of the Act which enabled the government to single out a particular case for reference to that Court, and the special procedure it followed denied them certain material advantages which the persons tried under the ordinary procedure would normally enjoy. In support of their contention reliance was placed on *West Bengal v. Anwar Ali Sarkar* and certain observations in *Qasim Razvi v. State of Hyderabad*. The respondent, however, relied on the decision of *Kathi Raning Rawat v. State of Saurashtra*.

Patanjali Sastri CJ, after considering the underlying purpose and policy of the Act,⁶⁷ reached the conclusion that “a system of Special Courts to deal with the special types of offences under

⁶⁵ AIR 1953 SC 287.

⁶⁶ AIR 1953 SC 404.

a shortened and a simplified procedure was devised, and it seems to us that the legislation in question is based on a perfectly intelligible principle of classification having a clear and reasonable relation to the object sought to be attained”.

In replying to the argument that the vice of discrimination consisted in the unguided and unrestricted power of singling out for different treatment one among a class of persons all of whom were similarly situated and circumstanced, he said:

“The argument overlooks the distinction between those cases where the legislature itself makes a complete classification of persons or things and applies to them the law which it enacts, and others where the legislature merely lays down the law to be applied to persons or things answering to a given description or exhibiting certain common characteristics, but being unable to make a precise and complete classification, leaves it to an administrative authority to make a selective application of the law to persons or things within the defined group, while laying down the standards or at least indicating in clear terms the underlying policy and purpose, in accordance with, and in fulfilment of, which the administrative authority is expected to select the persons or things to be brought under the operation of the law.”

Further, in his opinion whether an enactment providing for special procedure for the trial of certain offences was or was not discriminatory and violative of Article 14 must be determined in each case as it arose. “For, no general rule applicable to all cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary.” He quoted with approval the observations made by Fazl Ali and Mukherjee JJ in the *Saurashtra case* which distinguished *Anwar Ali Sarkar's case* and expressed his complete agreement with Mukherjee J when he said: “If Special Courts were considered necessary to cope with an abnormal situation, it cannot be said that the vesting of authority in the State Government to select offences for trial by such courts is in any way unreasonable.” In the present case also, the statute was, “in the context of the

⁶⁷ The Act was entitled “an Act to provide for the more speedy trial and more effective punishment of certain offences” and the preamble declared that “it is expedient to provide for the more speedy trial and more effective punishment of certain offences” as disclosed by its title, preamble and provisions.

abnormal post-war economic and social conditions", based on a readily intelligible classification and "obviously calculated to subserve the legislative purpose."

Bose J of the Supreme Court dissented from the majority view and while conceding that up to the date of the Constitution the impugned Act was good law, could not agree that the continuation of the trial after the Constitution under the special procedure which denied the appellants the right to a jury trial in the Calcutta High Court, did not result in discrimination. He strongly objected to the Provincial Government having the power "to pick out cases from among the specified classes and to send them to Special Courts and thus discriminate between man and man in the same class. He illustrated his viewpoint by the following example:

"...the West Bengal legislature could not, and indeed Parliament itself could not, have selected case A and case B and case C and accused X and Y and Z and sent them to the Special Courts for trial leaving others, similarly placed in the same class, for trial by the ordinary courts of law; and what the legislature itself could not do cannot be done by a delegated authority. Having made a classification, having given reason for it, the legislature would not, in my judgment, without assigning reasons for a sub-classification, arbitrarily select A, B and C and set them as a class apart in the classification already made. It is, in my view, as objectionable to make an arbitrary sub-classification out of a good classification as it is to make an arbitrary classification in the first instance....."

He concluded by pronouncing the caution: "If we wish to retain the fundamental liberties which we have so eloquently proclaimed in our Constitution and remain a free and independent people walking in the democratic way of life, we must be swift to scotch at the outset tendencies which may easily widen, as precedent is added to precedent, into that which in the end will be the negation of freedom and equality."

All these cases were referred to in a later case before the Indian Supreme Court in which it was observed that "different views have been expressed on the question of application of Article 14 to the facts and circumstances of the case but there is no difference on any principle as to the construction or scope of Article 14 of

the Constitution".⁶⁸ In this case the appeal arose out of a series of cases known generally as "The Burdwan Test Relief Fraud Cases" which originated from the test relief operation held in Burdwan district during famine in 1943. The Government decided that these cases were not fit for trial by jury and a notification was issued for trial of these cases by Sessions Court with the aid of assessors.

On behalf of the appellant it was contended that the notification was in excess of the powers conferred on the State Government under Section 269 (1) of the Code of Criminal Procedure and it denied the equal protection of the laws.⁶⁹ It was argued on behalf of the respondent that these cases formed one class of cases having the common feature that a mass of evidence regarding the genuineness of thumb impression and other things required consideration and that this would take such a long time that it would be impossible for a junior to keep proper measure of evidence.

Mahajan CJ, in delivering the unanimous judgment of the Court, said that inasmuch as the notification, in express terms, had not indicated the grounds on which this set of cases falling under the same sections of the Indian Penal Code, the classification had no relation to the object in view, that is, the withdrawal of jury trial in these cases.

Further, "the memory of jurors, assessors, judges and of other persons who have to form their judgment on the facts of any case can afford no reasonable basis for a classification and for denial of equal protection of the laws. Similarly, the quantum of evidence in a particular case can form no reasonable basis for classification and thus can have no just relation to the object in view. The features mentioned by the High Court can be common to all cases of forgery, conspiracy, dacoity etc."

The respondent, representing Government, relied on *Qasim Razvi v. State of Hyderabad* and *Habeeb Muhammad v. State of*

⁶⁸ *Dhirendra v. Suptdt.*, AIR 1954 SC 424.

⁶⁹ Section 269 (1) runs as follows:- The State Government may by order in the official gazette direct that the trial of "all offences or of any particular class of offences", before any Court of Session shall be by jury in any district, and may revoke or alter such order.

Hyderabad for his contention that the continuation of the trial after the inauguration of the Constitution under the notification issued in 1947, was not invalid even if it was discriminatory in character.

So far as the facts of the present case were concerned, these decisions, Mahajan CJ observed, completely negated that contention. He said:

“In both these decisions, it was pointed out that for the purpose of determining whether the accused was deprived of the protection under Article 14, the Court has to see first of all, whether after eliminating the discriminatory provisions, it was still possible to secure to the accused substantially the benefits of a trial under the ordinary laws ; and if so, whether that was actually done in the particular case. Now it is obvious that it is impossible to convert a trial held by means of assessors into a trial by jury and a trial by jury could not be introduced at the stage when the procedure prescribed by the notification became discriminatory in character. It is not a case where the discriminatory provision of the law can be separated from the rest. Again, a fair measure of equality in the matter of procedure cannot be secured to the accused in this kind of cases.”

The principles enunciated in these cases relating to the ambit and scope of the right to equality guaranteed by Article 14 were subsequently summed up in a full bench decision of the Indian Supreme Court.⁷⁰

Prohibition Against Discrimination

Articles 28 and 29 of the Constitution which contain prohibition against any discrimination on grounds only of religion, race, caste, sex or place of birth are instances of the general rule of equality guaranteed in Article 27.⁷¹ Articles 27, 28 and 29 are directed against inequality and discrimination and they supplement each other.⁷² Clause (1) of Article 28, which corresponds to

⁷⁰ *Babulal v. Collector of Customs*, AIR 1957 SC 877.

⁷¹ *All India Station Masters' Association v. General Manager*, AIR 1960 SC 384.

⁷² *General Manager v. Rangachari*, AIR 1962 SC 36 ; *Jaisinghani v. Union of India*, AIR 1967 SC 1427 ; *G.D.Kelker v. Chief Controller*, AIR 1967 SC 83.

Article 15 (1) of the Indian Constitution, prohibits the State from making any discrimination against a citizen on grounds only of religion, race, caste, sex or place of birth. A citizen cannot invoke this right if discrimination arises on a ground other than any of the specified grounds or unless discrimination is made by the State. The prohibition extends not only against Parliament and the Government but also to statutory public authorities.⁷³ A law which provided for separate electorate on the basis of religion was held void as discriminatory.⁷⁴ Residence and place of birth are distinct conceptions. This clause cannot, therefore, be read as prohibiting discrimination which is based on residence.⁷⁵

Clause (2) of this Article guarantees equal rights of women in all spheres of the State and of public life. This clause marks an advance over the Constitutions of Pakistan of 1956 and 1962 which did not provide such rights to women.

Clause (3) of the Article, which corresponds to Article 15 (2) of the Indian Constitution, prohibits any discrimination against a citizen in respect of access to places of public entertainment or resort or admission to any educational institution⁷⁶ on the grounds only of religion, race, caste, sex or place of birth. Discrimination is permissible in respect of places intended for religious purposes only.

A fundamental right is generally a prohibition against interference by the State, but this clause is directed also against individuals. So, besides, access to such places of public resort as are owned and managed by the State, for example, a public highway or street, museums, a public park, court houses, hospital, library, a public place of assembly etc., access to other places of public entertainment or resort owned by private individuals, such as cinemas, theatres, hotels and restaurants and the like must not

⁷³ Article 152, Constitution of Bangladesh.

⁷⁴ *Nain Sukh Das v. State of U.P.*, AIR 1953 SC 384.

⁷⁵ *Joshi v. State of Madhya Bharat*, AIR 1955 SC 334.

⁷⁶ Article 14 of the Constitution of Pakistan, 1956 and Article 16 of the Constitution of Pakistan, 1962 contained similar provisions.

in the same way be the subject of discrimination on any of the grounds mentioned in the clause.

Clause (3) of Article 28 embodies the principle of social justice and envisages social equality. As discrimination involves an element of unfavourable bias any law or individual practice disclosing such bias on any of the grounds mentioned therein will incur condemnation as violating a specific constitutional prohibition.⁷⁷ Whereas when Article 27 is pleaded against a statute, the burden is on the petitioner to prove unreasonable discrimination, when Article 28 is invoked, if the petitioner establishes discrimination on the grounds mentioned, it will be no defence to show that the State action is reasonable and meritorious.

There is, however, an exception to such prohibition in Clause (4) of the Article which provides that nothing in this Article shall prevent the making of any special provisions for women, children or for the advancement of any backward section of citizens. This clause corresponds to Clauses (3) and (4) of Article 15 of the Indian Constitution. Though with regard to right of access to places mentioned in Clause (3) sex alone cannot be a basis for any discrimination, yet the possibility of according special treatment to women in matters where differences of sex make this necessary or desirable must be recognised. In case of a conflict between this clause and Article 27 which contains the equality clause, the former will prevail. "Sex is a sound classification and although there can be no discrimination in general on that ground the Constitution itself provides for special provisions in the case of women and children."⁷⁸ Reservation is permissible where made for the advancement of any backward section of citizens.⁷⁹ Clause (4) of this Article does not impose any obligation on the state, it merely leaves to the government the discretion to take action if necessary⁸⁰. Special provisions may be made not merely by legislation, but also by an executive

⁷⁷ *Kathi Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123.

⁷⁸ *Yusuf v. State of Bombay*, AIR 1954 SC 321.

⁷⁹ *P. Rajendra v. State of Madras*, AIR 1968 SC 1012.

⁸⁰ *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649.

order. For, the State includes the government.⁸¹ This clause being an exception to Clause (1) of Article 28 cannot be so applied as to destroy the guarantee of Clause (1) of the Article.⁸²

The Effect of 'Only'

The expression 'only' has been used in Articles 28 and 29 of the Constitution. Some of the Indian decisions illustrate the meaning of 'only' which occupies a comparable position in Articles 15 (2) and 16 (2) of the Indian Constitution.

The expression 'on grounds only of' does not prohibit discrimination on grounds other than those mentioned in the Articles.

In *Anjali v. State of West Bengal*⁸³ a girl student sought admission to a men's college and on her application being refused by the authorities claimed the fundamental right of non-discrimination on the ground only of sex. In accepting the contention of the authorities that she was denied admission not on that ground, but because another women's college was to be developed, the Court said:

"What the Article forbids is discrimination and discrimination based solely on all or any of the grounds mentioned, in the Article. All differentiation is not discrimination, but only such differentiation as is invidious and as is made, not because any real difference in the conditions or natural difference between the persons dealt with which makes different treatment necessary, but because of the presence of some characteristic or affiliation which is either disliked or not regarded with equal favour but which has no rational connection with the differentiation made as a justifying reason. Next, the discrimination which is forbidden is only such discrimination as is based solely on the ground that a person belongs to a race, or caste or particular place or is of a particular sex and on no other ground."⁸⁴

A discrimination based on one or more of these grounds and also on other grounds is not hit by the Article. The decision seems to be based on an incorrect approach in that it mistook the

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ AIR 1952 Cal 825.

⁸⁴ *Ibid.*, at p. 829.

motive of refusing admission for a ground. The absence of a ground can in no case be covered by even a highly laudable motive or object.

In a case where provisions of the Court of Wards Act, 1912 which allowed the Government to disqualify a female proprietor on a simple declaration that she was incapable of managing her own property whereas a male proprietor could only be disqualified for misconduct, or mental or physical incapacity were impugned as violating Article 15 of the Indian Constitution, it was held that the classification was based on the ground of sex only. Though it was conceded that classification on the ground of sex was permissible in the case of labour laws as in the very nature of things it is necessary to grant female workers certain special privileges, it would, however, be "no reasonable classification to place a proprietor under a more disadvantageous position in respect of the assumption of the superintendence of the estate on the ground of sex alone. The same section provided that the estate of a male proprietor could be placed under the control of a court if he was found physically unfit or unsound, to be of bad character or extravagant, or if he was convicted of a non-bailable offence, or if he caused general discontent among the tenants by his mismanagement.⁸⁵

It may, however, be mentioned that the special provision is not restricted to measures which are advantageous to women.⁸⁶

Article 28 forbids any discrimination on the grounds only of religion, caste, sex, place of birth etc., but it has no application where the discrimination is based on domicile or residence. The element of birth does not include in it the requirements that constitute domicile. In a case which arose in India, provisions of the Bombay Beggars Act, 1945 were impugned as unconstitutional as it made a discrimination between beggars on the basis of place of birth. The applicant was convicted under the said Act, the allegation against him being that he was found begging in a public place. The Court observed that it was not correct to say that

⁸⁵ *A. Cracknell v. State of U.P.*, AIR 1952 All 746.

⁸⁶ *Nain Sukh v. State of U.P.*, AIR 1953 SC 384.

beggars neither born nor domiciled in the Province of Bombay could not be dealt with under the provisions of the Act. The use of the term 'domicile' in the Act is not, it may be mentioned, appropriate. It meant in this case, however, residence in the province of Bombay without present intention of removing from that province. The Act did not, therefore, infringe the rule against discrimination.⁸⁷

The Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, was impugned as invalid being inconsistent with the fundamental right guaranteed by Article 15 of the Indian Constitution. The aforesaid Act, it was contended, selected the Hindus for this kind of discriminatory legislation, while the Muslims could under their personal law continue to marry more than one wife. The Act prohibited bigamy among the Hindus and made it an offence. The Court said that though the argument seemed attractive the point for consideration was whether discrimination proceeded on the ground of religion. The classification here was not based on religion but on the fact that the Hindus and Muslims had all along been subject to their respective personal laws.

"It is that personal law that was now sought to be affected by the Act to the extent of modifying and abrogating the rule that a Hindu is entitled to marry any number of wives without restriction."

If the arguments of the petitioner were to be accepted, most of the personal laws of the Hindus may have to be changed as fundamental differences existed between their personal laws and the personal laws of the Muslims. The Act was, therefore, held valid.⁸⁸

Equality of Opportunity in Public Employment

Clause (1) of Article 29 of the Constitution guarantees equality of opportunity for all citizens in the matter of employment or office in the service of the Republic. The expression "the service of the Republic" means any service, post or office whether in a civil or military capacity, in respect of the government of

⁸⁷ *Vithal Murti v. State*, AIR 1952 Bom 451.

⁸⁸ *Srinivasa v. Saraswati*, ILR 1953 Mad 78.

Bangladesh, and any other service declared by law to be a service of the Republic.⁸⁹

Equality of opportunity in respect of employment under this clause means equality as between members of the same class of employees and not equality between members of separate classes.⁹⁰

This clause gives effect to the doctrine of equality in respect of appointment as well as promotion. Inequality of opportunity for promotion between holders of posts in the same grade may be an infringement of this clause, but those who hold posts in different grades are not entitled to invoke it.⁹¹ When an application for a post has been made, it must be considered on merits.⁹² A contract for the supply of goods to a government office cannot mean a contract of employment, though it may in some cases include an element of service.⁹³

Clause (2) prohibits discrimination in respect of employment or office in the service of Bangladesh on the grounds only of religion, race, caste, sex or place of birth. Where selection for promotion to the next higher grade is on the "basis of seniority-cum-merit" a public servant is entitled to claim relief under this clause if he is placed in the list of seniority contrary to the rules governing seniority.⁹⁴

Clauses (1) and (2) of the Article do not prohibit the framing of rules for selection to any employment or office.⁹⁵ The expression "in respect of" used in these clauses, if narrowly construed, may confine their application to the initial employment but matters, such as, salary and periodical increments therein, leave, gratuity, pension and age of superannuation may also be deemed as having been included by it.⁹⁶

⁸⁹ Article 152, Constitution of Bangladesh.

⁹⁰ *Sham Sundar v. Union of India*, AIR 1969 SC 212.

⁹¹ *Kishori Mohan v. Union of India*, AIR 1962 SC 1139; *G.D. Kelker v. Chief Controller*, AIR 1967 SC 839.

⁹² *Krishna Chandra v. The Chairman*, AIR 1962 SC 602.

⁹³ *C.K. Achutan v. State of Kerala*, AIR 1962 SC 602.

⁹⁴ *Union of India v. Vasant Joyram*, AIR 1970 SC 2092.

⁹⁵ *General Manager v. Rangachari*, AIR 1962 SC 36.

⁹⁶ *Ibid.*

In interpreting the provisions of Clause (2) of Article 16 of the Indian Constitution, which corresponds to Clause (2) of Article 29 of the Constitution of Bangladesh, the Supreme Court of India held that rejection of a Brahmin for appointment to any of the posts reserved for communities other than Harijans and backward Hindus must be regarded as discrimination based on caste only. His ineligibility for appointment created by the rule of communal rotation as laid down in the Madras Communal Government Order, infringed the provisions of Clauses (1) and (2) of Article 16 of the Indian Constitution. The petitioner who was a Brahmin, possessed all the requisite qualifications for being selected as a District Munsiff, but was not appointed to that post as the quotas reserved for the Brahmins were already filled up.⁹⁷

Clause (3) provides an exception by restricting the operation of Clauses (1) and (2) of Article 29. "A proviso or an exception cannot be so interpreted as to nullify or destroy the main provision."⁹⁸ It enables the State to make provision (a) for any backward section of citizens in order to secure their adequate representation in Government service, (b) to give effect to any law which has made provisions for reserving posts in any religious or denominational institution and (c) to reserve any employment or office for members of one sex only on the ground that it is unsuited to the members of the opposite sex. The provisions making such reservation need not be by legislation, they may be made by an executive order or directive.⁹⁹ This clause is not meant to corrode the principles relating to equality of opportunity embodied in the two preceding clauses of this Article.¹⁰⁰

It would seem that the Government's power to make special provisions for securing adequate representation of any backward section of citizens cannot extend to making reservations for people belonging to different communities unless they could be treated as backward.

⁹⁷ *Venkataraman v. State of Madras*, AIR 1951 SC 229.

⁹⁸ *Devadasan v. Union of India*, AIR 1964 SC 179; *Messrs East & West Steamship Co. v. Pakistan*, PLD 1958 SC 41.

⁹⁹ *Triloki Nath v. State of Jammu & Kashmir*, AIR 1969 SC 1.

¹⁰⁰ *Triloki Nath v. State of Jammu & Kashmir*, AIR 1967 SC 1283.

CHAPTER TEN

RIGHTS TO PROPERTY

The citizen's rights to property as guaranteed by the Constitution of Bangladesh are substantially different from those in the Constitutions of Pakistan, 1956 and 1962, and also the Indian Constitution. Article 40 guarantees the citizen's right to trade and business. His right to acquire, hold and dispose of property has been guaranteed by Article 42. The latter Article also delimits the State's power to take over any property, whether of a citizen or a non-citizen.

A. Freedom to Follow an Avocation

Article 40 provides that every citizen shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business. Qualifications may, however, be prescribed by Parliament for entry to such profession or occupation, and it may impose any restrictions on the right guaranteed by this Article. In most countries, the State prescribes qualification, rules of conduct for, and description of member of certain professions of trades.¹

The most interesting problem at the moment is whether the power to impose any restrictions on the State extends to total prohibition of a particular trade, profession or business. In the corresponding Article 12 of the Constitution of Pakistan, 1956

¹ "Even in those countries where the right to enter upon a trade or profession is not expressly subjected to conditions similar to Fundamental Right No.8 (Constitution of Pakistan, 1962), it was eventually found that State has, in the exercise of its police power, the authority to subject the right to a system of licensing, i.e., to permit a citizen to carry on the trade or profession only if he satisfies the terms and conditions imposed by the prescribed authority for the purpose of protecting and promoting general welfare". In support of these observations Yaqub Ali J referred to some decisions of the U.S. Supreme Court. *Government of Pakistan v. Akhlaque Hussain*, PLD 1965 SC 527 at p. 595.

the freedom of trade, business or profession was subject to regulation by a licensing system. The expression "reasonable" did not qualify the word "regulation" in that Article, as it does not qualify the word "restriction" in Article 40 of the Constitution of Bangladesh. The acceptance of socialism as one of the fundamental principles of State policy under the Constitution of Bangladesh has justifiably led to the omission of the qualifying phrase "reasonable" before the term 'restriction'. Further, the use of the word "any" has broadened the scope of restrictions that may be imposed by law on any trade, business or profession. The use of the word 'any' instead of the qualifying phrase 'reasonable' is comprehensive and intends not only to cover any measure of nationalisation which the State may undertake in respect of a particular trade or profession but also any other measures of social control. So, the question whether any measure, short of nationalisation, which may exceed all reasonable limits, will be hit by the provisions contained in Article 40 is, though besides the point, yet to be judicially determined.

Two types of restrictions are envisaged by the Article. One type of restrictions arises from the use of the expressions "possessing such qualifications, if any, as may be prescribed by law in relation to his profession, etc." This kind of restrictions aim at the competence, skill, fitness and special knowledge of a citizen before he may be allowed to enter upon a profession or trade. It is common experience that in certain profession or trade competence or knowledge must be prescribed by the State in order to promote general welfare.

The other type of restrictions which a law may impose arise from the words "subject to any restrictions" which preface the right itself guaranteed by the Article. Restrictions other than those which relate to competence, fitness, skill or special knowledge of the citizen desirous of entering upon a profession or trade are contemplated by those words.

Meaning of the term "Lawful"

As there are vital differences in Article 40 of the Constitution of Bangladesh and the corresponding provisions in Article 19 (1)

(g) and (6) of the Indian Constitution, the Indian rulings should be referred to with due regard to those differences. In India, by the Constitution (First Amendment) Act, 1951, the citizens right to practice any profession or to carry on any occupation, trade or business has been subjected to reasonable restrictions which may be imposed by law in the interests of the general public. In the Constitutions of Pakistan of 1956 and 1962, a trade or profession could be regulated by a licensing system.² Unlike the Indian provisions but as in the Constitutions of Pakistan, the word 'lawful' has been used in Article 40 to qualify the expressions 'profession', 'occupation', 'trade' or 'business'.

The use of the word 'lawful' before 'profession' etc. and of the word 'any' before 'restrictions' in this Article may arguably be viewed as indicating that this right is not actually intended to be a fundamental right. For, in the above circumstances, there is reasonable scope for the supposition that the extent of the denial of this right by the legislature cannot be judicially examined or determined.

² Article 12, Constitution of Pakistan, 1956 and Fundamental Right No. 8, Constitution of Pakistan, 1962. In view of the radical differences between the provisions of Article 40 and those of the corresponding provisions in the Constitution of Pakistan, 1956 what Connelius J, as he then was, said about the principle underlying the latter may not seem appropriate so far as Article 40 is concerned. He said : "It is the general principle of the common law that a man is entitled to exercise any lawful trade and calling as and when he wills; and the law has always regarded jealously any interference with trade, even at the risk of interference with freedom of contract, as it is public policy to oppose all restraints upon liberty of individual action which are injurious to the interests of the State". *East and West Steamship Co. v. Pakistan*, PLD 1958 SC 41.

But the right to carry on a trade or practise a profession will be available to a citizen of Bangladesh if the trade or profession has, subject to any restrictions, been allowed to be continued. In such circumstances the following observations of Kaikaus J may still hold good :

"I would hold therefore, that the first part of Fundamental Right No. 8 establishes the indefeasible right of every citizen to practice a profession provided he fulfils the requirements as to knowledge, skill and moral standard prescribed by law. To put it shortly the citizen has a right to carry on any profession provided he possesses the competence for it". Per Kaikaus J in *Government of Pakistan v. Akhlaque Hussain*, PLD 1965 SC 527.

Views of Muhammad Munir CJ as expressed in his book³ regarding the scope of the freedom of trade and occupation guaranteed by the Constitution of Pakistan, 1962 may be noted in this connection. In saying that the use of the word 'lawful' before trade or profession enabled the State "completely to ban a profession, occupation, trade or business by declaring it to be unlawful", the learned author said:

"Unlawful' in common parlance means anything forbidden by law and this is also the meaning assigned to it in law. Therefore, the right to enter upon a profession or occupation or to conduct any trade or business, can hardly be described to be a constitutional or fundamental right when such right may be denied by law."⁴

Even in India, cases determining the meaning and scope of the right to trade and occupation guaranteed by Article 19 (1) (g) wherein the word 'reasonable' has been used to qualify 'restrictions' amply demonstrate the exercise of wide powers of social control in restricting a profession or occupation.⁵

Even so, the right guaranteed by Article 40 though denuded much of its effectiveness by the above mentioned limitations may not be found altogether meaningless, and the question of legislative competence in prescribing qualifications, rules of conduct etc. with regard to a particular trade or profession may legitimately arise and have to be determined under this Article. A citizen is entitled to carry on any business, trade or profession if the acts which are required to carry it on are not unlawful. In the words of Kaikaus J.

"If an act involved in a business, trade, profession, or occupation, is such that if performed otherwise than as a part of a business, trade, profession or occupation, it is unlawful then it cannot become lawful just because it is performed as a part of a business, trade or profession, that is, as a part of activity indulged in for the purpose of profit or income."⁶

³ Muhammad Munir, *Constitution* (1965).

⁴ *Ibid.*, at p. 129.

⁵ *Manohar Lal v. The State of Punjab*, AIR 1961 SC 418; *Ramdhani Das v. The State of Punjab*, AIR 1961 SC 1559; *Unichobi v. The State of Kerala*, AIR 1962 SC 12; *J.K. Vellukunnel v. Reserve Bank of India*, AIR 1962 SC 1371; *Basti Sugar Mills Ltd. v. Ram Ujagar*, AIR 1964 SC 355.

⁶ *Progress of Pakistan Co. Ltd. v. Registrar, Joint Stock Companies, Karachi*, PLD 1958 Lah 887.

In the absence of the qualifying word "lawful", as in the corresponding provisions of the Indian Constitution, a citizen might have claimed to make lawful a business of an act that is an offence or is prohibited.

In spite of the lack of this qualifying word in Article 19 (1) (g) such activities as, gambling, trafficking in women and the like were not considered to be legitimate commercial activities by overwhelming social opinion. Transactions which are inherently vicious and being *res extra commercium* do not constitute trade.⁷ The argument that the words 'trade' or 'business' must be read in their widest amplitude did not appeal to the Court, because

"On this argument it will follow that criminal activities undertaken and carried on with a view to earning profit will be protected as fundamental rights. Thus there will be a guaranteed right to carry on business of hiring out goondas to commit assault or even murder, of house-breaking, of selling obscene pictures, or trafficking in women, and so on until the law curbs or stops such activities."⁸

Subject to any restrictions that may be imposed by law, a citizen, has under Article 40 the fullest right to carry on any business or profession. This, however, is subject to a limitation. The business or profession must be lawful. By the use of the word "lawful" this intent has been made clear. Kaikaus J, while referring to the meaning of 'lawful' used in Article 12 of the Constitution of Pakistan, 1956, quite pertinently observed:

"Theft is unlawful and, therefore, no person can make a business of it. Blackmail is an offence and no citizen can claim that as it is his occupation, he is entitled to blackmail people. It is on account of the word 'lawful' in this Article that the thief, the blackmailer and others whose business involves unlawful acts are prevented from putting forward an argument which may have been open to them if this word did not occur in Article 12."⁹

⁷ *State of Bombay v. R.M.D. Chamarbaugwala*, AIR 1967 SC 699.

⁸ *Ibid.* The Court, however, expressed the opinion that the words 'trade', 'business', 'profession' or 'occupation' mean any activity which is undertaken or carried on with a view to carrying profit. But, as was held in *Re Law Reporting Council*, (1889) 22 QBD 279, the Council of Law Reporting carried on trade though it did not make or desired to make any profit.

⁹ *Progress of Pakistan Co. Ltd. v. Registrar, Joint Stock Companies, Karachi*, PLD 1958 Lah 887.

He was, however, of the opinion that a Legislature is not permitted to make a business as such unlawful, if the individual act involved in it is not unlawful:

"It can make any act involved in a business unlawful and the citizen would be debarred from doing that act but the Legislature cannot say that while the act involved in a profession will be lawful if not performed as a part of business, etc. the doing of the same act as a part of a business will be unlawful."

He gave an instance to make clear the proposition by saying that there is no bar to the Legislature providing that sale of tobacco shall be an offence. But it cannot say that while the sale of tobacco will not be an offence, no person shall carry a business of sale of tobacco.¹⁰

Several meanings of the word "lawful" used in Article 12 were considered in a case which involved the question whether the profession of a prostitute was lawful.¹¹ Kayani CJ, who delivered the judgment, referred to the dictionary senses in which the word "lawful" is used. It means (1) according to law, or (2) not contrary to law, or (3) permitted by law, or (4) sanctioned or recognised by law, or (5) pertaining to or concerned with law. According to him, none of the above meanings excepting the second was applicable. Accordingly, if the second dictionary meaning "not contrary to the law" can be applied to the word "lawful" the profession of prostitution cannot be said to be a profession which is not lawful. As Kayani CJ observed:

"This means that if there is a law which prohibits prostitution, then prostitution, will not be a lawful profession. For the same reason, if there is a law which places some restriction on prostitution, then prostitution will be lawful subject to that restriction."¹²

Differing from the views of Kaikaus J that it was contradiction in terms to say that a fundamental right exists, but that it can be taken away by law, Kayani CJ felt that if the dictionary meaning of the word "lawful" which he suggested were acceptable, there would be no such contradiction, "because the profession is

¹⁰ *Ibid.*

¹¹ *Mehtabjan v. Municipal Committee, Rawalpindi*, PLD 1958 Lah 929.

¹² *Ibid.*

guaranteed only subject to its being lawful, and perhaps the Constitution may have acted pardonably if it relied on the Legislature to determine whether a profession should be declared unlawful. I think there is no fear that a recognizedly decent profession like that of a physician will ever be prohibited”.

In holding that the order passed by the Municipality of Layallpur prohibiting the carrying on of the profession of prostitution in the centre of the city, did not violate the Constitutional provisions which allowed the free practice of profession subject to the power of regulation by the State, the Supreme Court of Pakistan observed that though an attempt to squeeze the profession of prostitution may be found to be inconsistent with the above provisions, its practice may not be allowed to be continued under the too favourable conditions it was enjoying in the centre of the city.¹³ Since the prohibitory order was made “in bonafide regulation of this ancient profession in the Municipality of Lyallpur it cannot be condemned as unconstitutional. In the opinion of Cornelius CJ, the municipal regulation, however, suffered from a fault. He mentioned that “where interference in the exercise of Municipal authority is proposed with the modes of livelihood actually practised by persons resident within the Municipal area”, the minimum requirements which should be followed before framing such regulations is that it must be preceded by a “proper enquiry as to the desirability or otherwise of allowing the profession to be practised where it had been established since the foundation of the town, and again as to the appropriate steps, which should be taken to disperse the practitioners of the profession and confine their activities to areas selected for the purpose in the general interest, including that of the practitioners themselves.”¹⁴

Can the Imposition of “Any Restrictions” Lead to Prohibition of a Trade?

No decision has yet determined the scope and extent of the right guaranteed by this Article. It may, however, be profitable

¹³ *Sardaran v. Municipality, Layallpur*, PLD 1964 SC 397.

¹⁴ *Ibid.*

to consider a few decisions given by the Judicial Committee of the Privy Council and the Australian High Court as to the particular problem raised by the conferment of power to regulate trade. The observations of the Judicial Committee that "regulation of trade might clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them, or of excluding from passage across the frontier of a state creatures or things calculated to injure its citizens", are unexceptionable.¹⁵ It may be mentioned that the terms possessing such qualifications, if any, as may be prescribed by law in relation to his profession, occupation, trade or business" used in Article 40 appears to cover such prohibitory measures as are mentioned in the *Bank Nationalisation case*.¹⁶

In an appeal from the Supreme Court of Canada, the question before the Judicial Committee of the Privy Council was whether under a power to pass bye-laws for "regulating and governing" hawkers etc., the Corporation of Toronto might prohibit them from plying their trade at all in a substantial and important portion of the city, no question of any apprehended nuisance being raised.¹⁷ In holding the bye-laws *ultra vires* Lord Davey observed:

"No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise, both as to time and, to a certain extent, as to place, where such restrictions are in the opinion of the public authority, necessary to prevent a nuisance as for the maintenance of order. But their lordships think that there is a marked distinction between the prohibition or prevention of a trade and the regulation or governance of it, and, indeed, a power to regulate and govern seems to imply the continued existence of that which is to be regulated and governed. An examination of other sections of the Act shows that when the legislature intended to give power to prevent or prohibit it did so by express words, and that the framers of the Act did not intend to include a power to prevent or prohibit in a power to regulate or govern."

¹⁵ *Commonwealth of Australia v. Bank of New South Wales*, (1950) AC 235 at 312.

¹⁶ *Ibid.*

¹⁷ *Municipal Corporation of the City of Toronto v. Virgo*, (1896) AC 88. These principles were approved in *A. G. for Ontario v. A. G. for the Dominion*, (1896) AC 348 and *Bhola Prasad v. Emperor*, AIR 1942 FC 17.

The question whether "regulation" includes "prohibition" came to be considered in a number of cases in Australia involving the interpretation of Section 92 of the Commonwealth of Australia Constitution.¹⁸

Whereas this Article looks at inter-state trade from the viewpoint of national trade as a whole, Article 40 of the Constitution of Bangladesh looks upon freedom of trade from the viewpoint of a citizen who wishes to carry on a trade. The distinction between the absolute freedom of inter-state trade, commerce and intercourse apparently guaranteed by Section 92 of the Australian Constitution and the freedom of profession or trade guaranteed by Article 40 is that the latter expressly provides that any restrictions may be imposed by law upon such profession or trade whereas in the former no restriction on the absolute freedom of trade is expressed. As a result, in interpreting Section 92, the Australian High Court and the Judicial Committee of the Privy Council reached two main conclusions which have been described as Australia's main Constitutional failure. The first is that the conception of freedom of trade, commerce and intercourse in a community regulated by law presupposed some degree of restriction upon the individual, and the second is that "in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to state monopoly was the only practical and reasonable manner of regulation".¹⁹

In the *Bank Nationalisation Case*, Section 46 of the Banking Act, 1947, which, while leaving untouched the Commonwealth and State Banks, prohibited the carrying on in Australia of the business of banking by private banks, was held invalid as infringing Section 92 of the Australian Constitution. Prohibition is not regulatory. Lord Parker quoted with approval from the

¹⁸ Section 92 runs as follows:—"On the imposition of uniform duties of customs, trade, commerce, and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free".

¹⁹ *Commonwealth of Australia v. Bank of New South Wales* (1950) AC 235 at 311. Also *Hughes and Vale Pty. Ltd., v. State of New South Wales*, (1954) 3 All E. R. 607.

judgment of the *Australian National Airways Pty. Ltd., v. The Commonwealth*.²⁰

“One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulating, of inter-state trade and commerce is invalid. Further, a law which is ‘directed against’ inter-state trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-state trade, notwithstanding section 92” and said that “simple prohibition is not regulation”.

In *Hughes and Vale Proprietary Ltd. v. State of New South Wales*²¹ the appellant, a company incorporated in New South Wales, operated as a carrier of general merchandise between Sydney in New South Wales, and Brisbane in Queensland, and owned motor vehicles. The New South Wales State Transport (Co-ordination) Act, 1931-1952, provided for the licensing of motor vehicles engaged commercially in the transport of passengers and goods on the public highways of New South Wales, and prohibited all unlicensed transportation and authorised the imposition of certain charges on transport operations. In deciding the question of validity of the licensing provisions of the impugned Act, Lord Morton of Henryton, delivered the opinion of the Judicial Committee of the Privy Council and said that as a simple prohibition of the trade of an individual or such a prohibition subject to a discretionary exemption was not merely regulatory of the trade (and, not being merely regulatory, would offend against Section 92 of the Constitution within the principle stated in *Commonwealth of Australia v. Bank of New South Wales*) because the individual was thereby not allowed in effect to carry on his trade at all, so the prohibition in the Transport Act of the operation of transport unless authorised by licence which might be granted or withheld at the discretion of a state authority was not merely regulatory of trade, commerce and intercourse among the states.

²⁰ 71 C. L. R. 29 at 61.

²¹ (1954) 3 All E. R. 432.

Since Article 40 of the Constitution of Bangladesh provides the power to impose 'any restrictions' on trade or profession which is bound to be substantially different from the power to regulate a trade or profession by a licensing system or in the interest of free competition as provided under the Constitutions of Pakistan, 1956 and 1962, the cases interpreting the scope of the freedom of trade or profession guaranteed by the latter Constitutions may not be entirely to the point. Nevertheless, if the expression "power to regulate" may, in cases depending on facts and circumstances peculiarly their own, be equated with the "power to impose any restrictions", the cases deciding the meaning of the expression "regulation" as used in those Constitutions may offer some indication as to the ambit and scope of the expression "any restrictions" which occur in Article 40. Needless to say, having regard to the difference in outlook and content, not only of this Article but the Constitution as a whole, the constitutionality of restrictions imposed by Parliament with a view to implementing any measures of socialistic economic programme may have to be decided without any reference to those cases which had no concern with such economic doctrines or necessity.

It would be quite interesting to note that though in Article 12 of the Constitution of Pakistan, 1956 the expression "reasonable restrictions" did not occur, but the same occurred in Article 19(1) (g) of the Indian Constitution, Courts in Pakistan favoured the introduction of the concept of reasonableness in interpreting the scope of that Article. In a case decided as early as 1957 it was observed:

"There is considerable difference between Article 12 of our Constitution and Article 19 (6) of the Indian Constitution. The expression 'reasonable restrictions' does not exist in our Article 12, but this does not mean that imposition of unreasonable restrictions on trade is permissible under our Constitution. The measure of reasonableness in our Constitution is provided by the concept of the expression "regulation" itself. The restrictions should be consistent with the purpose of "regulation" and not so unreasonable as to be in excess of it. The order prohibiting the sale of meat on certain week days imposes a restriction which is in excess of the limits implied in the

meaning of "regulation" and amounts to prohibition—this argument is unhelpful because no factual basis for the contention has been disclosed, and unless it is shown in a concrete manner as to how the restrictions imposed are in excess of the object or the actual limits of regulation for the purposes of this case, it is impossible to judge whether the restrictions are proper according to the circumstances or in excess of the need and therefore unreasonable."²²

It would seem, then, that regulation must not go beyond what a reasonable person would regard as necessary to achieve the object for which it is imposed. Be this as it may, in a case decided by the Supreme Court of Pakistan in 1965, *Yakub Ali J*, while referring to the Legislature's power to impose restrictions on the freedom of trade or profession, stressed the need for reasonableness of restrictions.²³ He said:

The right is, thus, not unfettered; but, as said a little while ago, the restrictions must be reasonable in that the qualifications must bear a true relation to trade and profession and for purposes of promoting general welfare."²⁴

Reverting to the case of *Shahabuddin v. Pakistan*²⁵ the petitioner who was a retail beef and mutton dealer, challenged the provisions of Karachi Cattle Slaughter (Control) Act, 1950, the rules made thereunder, and the provisions of Karachi Essential Articles (Price Control and Anti Hoarding) Act, 1953, as contravening Article 12 of the Pakistan Constitution of 1956. No objection, however, was raised as to the absolute prohibition of the slaughter of medically unfit and useless cattle. The name of the Act suggested control and as there was no indication of object it was not possible to judge whether the restrictions were regulation in the correct sense or were in excess of it. Regulation was different from control. Qadeeruddin J said:

"Regulation is different from control. The word 'control' only means dominance of a superior authority. The meaning of the word does not necessarily imply a purpose other than the subjection of

²² *Shahabuddin v. Pakistan*, PLD 1957 Kar 854.

²³ *Government of Pakistan v. Akhlaque Hussain*, PLD 1965 SC 527.

²⁴ *Ibid.* at p 595.

²⁵ PLD 1957 Kar 854.

the subordinate. It is not so with the expression 'regulation' because regulation is not an antithesis of disorderliness. It is more than orderliness. It means orderliness with an object in view."²⁶

After referring to some dictionary meanings of the word 'regulation' such as 'to adapt to circumstances or surroundings', 'to adjust in respect of time, quantity, force etc. with reference to some standard or purpose', the learned Judge went to say,

"Regulation of trade for the sake of regulation may amount simply to the control of trade. It is commonplace to state that complete prohibition is not included in the idea of regulation, but it is also equally true to say that the exercise of some restraints is implicit in it. How much of restriction is consistent with the idea of regulation can be determined only with reference to the object with which a situation, things or actions are regulated. It is the purpose of regulation which can provide the measure of permissible restraint."²⁷

In answering the argument that the idea of regulation conveyed a sense of continuity of the rights which are regulated and then an interruption in the continuity of trade by long intervals of three days in a week caused a deprivation of occupation for the petitioner and was an unreasonable restraint on trade, the learned Judge said that once some restraint was conceded in the idea of regulation it could not be argued that restraint in respect of volume and not time was only permissible. Three days' interruption in the week in the sale, purchase and procurement of meat did not conflict with the idea on continuity implied in the expression 'regulation'. Whether the restrictions imposed by way of regulation were permissible or not could be measured by a reference to the needs of the object or purpose of the Act. The learned Judge further said that regulation of trade by a licensing system was different from conferment of discretionary powers on executive authorities. In the present case as there was no control at the source of supplies but control related only to the retail prices and sale of meat, without also any reference to the quality of meat, the fixing at will of the maximum prices had the characteristics of a scheme of permits and not a system of licensing.

²⁶ *Ibid.*

²⁷ *Ibid.*

When entry to any profession depends on the possession of qualifications prescribed by a statute for the regular conduct of such a profession, no challenge to the reasonableness of the prescription is permissible. Since the terms regarding the possession or occupation etc., in Article 40 are the same as those used in the Constitution of Pakistan, 1962, it would seem that what Muhammad Munir CJ said about their meaning and scope may be found applicable to the former:

“The exercise of the right of freedom of profession or occupation is subject to any law that may prescribe qualification, the reasonableness of the prescription is not justiciable, unless the prescribing law is itself questioned on some other ground, e.g. on the ground of its violating the equality provision, excess of jurisdiction, or of the law not being a valid attack on its constitutionality.”²⁸

But this cannot mean, as was rightly observed by him, that “the Legislature, on the pretext of prescribing qualification” is empowered to “impose conditions which have no relation to the fitness or suitability of a person to enter a profession”.²⁹ A few cases decided by Courts in Pakistan may be considered. In a case before the Supreme Court the appellant, an advocate, who on his appointment as Judge of the Sind Judicial Commissioners’ Court gave an undertaking not to practise in that court after retirement contended that his undertaking did not debar him from practicing in the Karachi Bench of the High Court of West Pakistan.³⁰ It was held by the Supreme Court of Pakistan that the appellant’s right to practise in the High Court by virtue of his enrolment under Clause 7 of Letters Patent was a statutory right, not subject to any exercise of discretion by the High Court. The Karachi Bench of the West Pakistan High Court which took the place of the Sind Chief Court after the abolition of the Sind Judicial Commissioners’ Court could not be regarded the same as the latter. Muhammad Munir CJ distinguished the petitioner’s

²⁸ Muhammad Munir, *Constitution*, at pp. 131-132. (1965)

²⁹ *Ibid.*

³⁰ *Hatim B. Tyabji v. Chief Justice and Judges of West Pakistan High Court*, PLD 1957 SC 272.

position from that of Sir Iqbal Ahmad.³¹ As the undertakings of Judges were not kept alive by the Order (High Court of West Pakistan Establishment Order XIX of 1955) establishing West Pakistan High Court, the petitioner's position was different from that of Sir Iqbal Ahmad who, by virtue of his undertaking and the operation of the amalgamation order expressly keeping alive undertakings given by judges, was held to be rightly barred from appearing before the High Court at Allahabad and in any subordinate court within the territorial jurisdiction of the Allahabad High Court prior to its amalgamation with the Oudh Chief Court in 1948. Munir CJ said:

"An undertaking, as such, is not *sine qua non* in relation to the validity of an appointment. That points to the necessity of strict interpretation of such an undertaking where it is given. This necessity has received a great enhancement of importance by the declaration, as a fundamental right in Article 12. A proviso saves, *inter alia* the regulation of a profession by licensing system. The appellant possessed the qualifications and complied sufficiently with the conditions of the 'licensing system' applicable to the profession in question, to have gained enrolment as an Advocate of the High Court.³²

When a former Judge of West Pakistan High Court was engaged by a litigant to move a writ petition on his behalf before that Court, question was raised as to his right to appear and act as an Advocate in the proceedings. The question having been decided by the Full Bench of the Lahore High Court in his favour,³³ an appeal was preferred before the Supreme Court of Pakistan against the decision.³⁴ The precise point raised in appeal was that the provisions of the Legal Practice (Disqualification) Ordinance, 1964 disqualified him from pleading or acting before the West Pakistan High Court. In reversing the judgment of the High Court, the Supreme Court held that the impugned Ordinance which "operates in aid of maintenance of the judicial machinery at the apex of the system in that state of dignity,

³¹ *Sir Iqbal Ahmad v. The Allahabad Bench*, AIR 1950 All 162 and AIR 1950 FC 71.

³² *Hatim B. Tyabji v. Chief Justice*, PLD 1957 Kar 272.

³³ *Akhlaque Hussain, In the matter of*, PLD 1965 Lah 147 (FB)

³⁴ *Government of Pakistan v. Akhlaque Hossain*, PLD 1965 SC 527.

which is essential to its proper operation" is valid to prevent the respondent who was a former Judge from appearing before the High Court of West Pakistan. The Court's judgment proceeded on the interpretation of the clauses relating to the fundamental right to trade and profession guaranteed by the Constitution of Pakistan, 1962 and their effect on the relevant statutes which controlled entry to the legal profession. Every citizen who possessed such qualifications as may be prescribed with regard to a profession had the right to enter upon that profession, but his freedom of choice so guaranteed by the Constitution was not, as Sattar J observed, intended to mean that "whosoever possesses the qualifications in relation to a profession, can enter such a profession and carry on the same". The term "enter" has reference to "choice only and not to right of practice".

In one of the cases before the Supreme Court of Pakistan involving a challenge to the validity of some of the provisions of the Control of Shipping Act, 1947, Muhammad Munir CJ said:

"If the effect of a licensing system be prohibition as it was so held in *Hughes' case*, then it follows that prohibition of a trade by a licensing system was contemplated by framers of the Constitution. What Mr. Brohi contends is that the power to regulate does not include the power to prohibit. But if the Constitution gives to the legislature the power to regulate a trade by a licensing system, it must follow that the power to prohibit vests in the legislature in so far as the trade under such system may only be carried on by the licensed persons or corporations."

In a case which raised the extent of the power of the Government to regulate Inter-Provincial Trade and Commerce by making allotment of quotas by methods of granting permits, the questions involved were whether in regulating the 'Pan trade', it was, in fact, prohibited and whether the rules framed by the Government were in excess of its power.³⁵ Murshed CJ of the Dacca High Court referred to a number of cases on both these contentions and so far as the question regarding excessive delegation was concerned he was of the view that where the regulatory law under which rules were framed did not define the principle or

³⁵ *Ghulam Zamin v. A. B. Khondker*, PLD 1965 Dac 156.

policy to be implemented by the rules, it was open to challenge on the ground of excessive delegation of legislative power. It is not merely a Constitutional requirement to lay down standards and norms but, in his opinion, it is possible that "reasonable direction and guidance should be given in various ways under which the Executive may be vested with substantial discretionary powers to work out the details of legislative policies and norms."³⁶ Its constitutionality may also be attacked on the ground of discrimination. As regards the meaning of the expression "regulation", the learned Chief Justice quite candidly confessed that "it is a term which is incapable of exact definition but is easily understood". In the words of Murshed CJ:

"Thus, it is evident that 'regulation' is distinct from 'restrictions'. It is also distinct from 'prohibition'. It is furthermore distinct from the expression 'control'. It is practically the antithesis of an unguided system of permits and quotas. Regulation, therefore, is not synonymous either with the term 'prohibition' or the expression 'restriction' or with the word 'control'. Although regulation may involve a certain amount of prohibition, restriction and control, but the concept of the regulation is totally distinct from the connotation of the terms 'prohibition', 'restriction' and 'control'. Regulation carries with it the idea of guidance for the proper functioning of a state of affairs. It carries with it a concept of imparting a suitable course and direction to a thing. Furthermore, regulation is correlated to an objective and anything which lacks point and direction and is governed by an unrestricted discretion is not regulation but unmitigated 'control'.³⁷

B. Citizen's Right to Hold Property and the State's Power to Deal with it.

Article 42 deals with the citizen's rights to property. Article 42 consisting of two clauses contains the substantive provisions relating to rights to property. Article 47 excepts certain laws involving rights to property and one or two other rights guaranteed by the Constitution and places them beyond control by Courts.

³⁶ *Ibid.*, at p. 192.

³⁷ *Ibid.*, at p. 187.

Clause (1) of Article 42 combines in it the provisions which guarantee to the citizen the right to acquire, hold, transfer or otherwise dispose of property³⁸ and those which delimit the State's power to acquire private property. A citizen may hold and deal with his property in any manner he likes³⁹ but subject only to any restrictions that may be imposed by an Act of Parliament. The use of the word 'any' before 'restrictions' has apparently lessened the scope of justiciability which would have otherwise been available if the word 'reasonable' were used instead. The preference for this particular qualifying word would seem to aim at widening the power of the State to limit the citizen's right to own property and secondly, to harmonise such right with the rights to property guaranteed by this Article.

The latter part of Clause (1) of Article 42 which is not confined to citizens only⁴⁰ delimits the State's power to acquire, nationalise or requisition property. Private property can be acquired, nationalised or requisitioned only under legislative authorisation⁴¹ and these are the three modes by which one can be deprived of one's property.

But public purpose has not been made a condition precedent to the exercise of compulsory acquisition or requisition by the State. In India, prior to the amendment of Clause (2) of Article 31 by the Constitution (Fourth Amendment) Act, 1955 which introduced 'public purpose' as a condition precedent to compulsory acquisition of private property, the existence of

³⁸ The phrase 'to acquire, hold and dispose of property' occur in Sections 111 and 298 of the Government Act, 1935; Article 19 (1) (f) of the Indian Constitution; Article 11 (b) of the Constitution of Pakistan, 1956 and Fundamental Right No. 13 of the Constitution of Pakistan, 1962.

³⁹ "The freedom to 'hold property' means a right to enjoy property and if there is any interference with the enjoyment of property it is tantamount to interference with the right to 'hold property'. This right to enjoy property involves a right to enjoy it in such manner as the owner chooses." *N. Sundaraja Iyer v. Sub-Collector*, AIR 1957 Mad 33.

⁴⁰ *Indo-China Navigation Co. v. Jasgit*, AIR 1964 SC 1140.

⁴¹ *Dwarkadas v. Sholapur Spinning Co.*, AIR 1954 SC 119; *State of West Bengal v. Subodh*, AIR 1954 SC 92; *State of Bihar v. Rameshwar*, AIR 1961 SC 1649. The law providing for acquisition or requisition must be strictly complied with.

public purpose was regarded as an implied condition.⁴² Whether the Courts in Bangladesh would follow the same example is yet to be seen.

Further limitations are imposed by Clause (2) of Article 42. It lays down that a law may or may not provide for compensation when it acquires, nationalises or requisitions any property, but if it provides for compensation it must fix the amount or specify the principles and also the manner of assessment and payment of compensation. Clause (2) of Article 42 expressly prohibits the Court from declaring a law unconstitutional on the ground that it does not provide for compensation or that any provision in it regarding such compensation is not adequate.

A wide range of laws has been placed beyond the pale of judicial review and declared that they shall not be void on the ground that they are inconsistent with, or take away, or abridge any of the fundamental rights.⁴³ Any such law will, however, be beyond the control of courts if only Parliament, while enacting it, or, in the case of an existing law, by an amendment, has declared that such laws are intended to give effect to any of the fundamental principles of state policy. The laws which are thus immunised against challenge in a Court of law are laws providing for:

- (a) The compulsory acquisition, nationalisation or requisition of any property, or the control or management thereof whether temporarily or permanently;
- (b) the compulsory amalgamation of bodies carrying on commercial or other undertakings;
- (c) the extinction, modification, restriction or regulation of rights of directors, managers, agents and officers of any such bodies, or of the voting rights of persons owning shares or stock (in whatever form) therein;
- (d) the extinction, modification, restriction or regulation of rights to search for or win minerals or mineral oil;
- (e) the carrying on by the Government or by a corporation owned, controlled or managed by the Government, of any trade, business, industry or service to the exclusion, complete or partial, of other persons; or

⁴² *Rameshwar v. Secretary of State*, (1907) ILR 34 Cal 470 at p. 480. The Executive cannot deprive a person of his property without specific legal authority, *Mohammad Hossain & Ors. v. General Manager, E. B. Railway, Ctg.* (1962) 14 DLR (Dac) 874 ; *Bishan Das v. State of Punjab*, AIR 1961 SC 1570.

⁴³ Article 47, Clause (1).

- (f) the extinction, modification, restriction or regulation of any right to property, any right in respect of a profession, occupation, trade or business or the rights of employers or employees in any statutory public authority or in any commercial or industrial undertaking;

if Parliament in such law (including in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of state policy set out in Part II of this Constitution.⁴⁴

A court may, however, declare that a particular enactment does not fall within the scope of the aforesaid category of laws. In doing so, the Court may have to examine whether the impugned legislation is a colourable device.

A large number of existing laws specified in the First Schedule of the Constitution including any amendment of any such law has also been made immune from challenge in a Court of law.⁴⁵ Such laws shall have full force and effect but neither such laws nor anything to be done or omitted to be done under them shall be deemed to be void or unlawful on the ground of inconsistency with, or repugnance to any provision in the Constitution. Most of these laws relate to property.

Not only are such laws beyond the reach of Courts, they are placed even beyond Parliament's power to repeal or modify if such modification or repeal aims to divest the State of its property or to enhance any compensation payable by the State. Parliament's power in this respect is, however, not altogether fettered. If any Act aims to achieve any of these purposes, it must be passed by not less than two-thirds of the total number of members of Parliament.

The aforesaid provisions limiting the Court's power to declare a law relating to property void on the ground of its

⁴⁴ Article 47, sub-clauses (a) to (f) of Clause (1). These provisions are similar to those contained in Article 31A of the Indian Constitution. Excepting the East Bengal (State Acquisition and Tenancy) Act, 1950 all other laws included in the First Schedule of the Constitution were enacted within a year prior to the commencement of the Constitution of Bangladesh.

⁴⁵ Article 47, Clause (3).

inconsistency with any fundamental right make it clear that the establishment of the predominance of Parliament, as sought to be achieved in India by several Constitutional amendments,⁴⁶ had been intended by the framers of the Constitution of Bangladesh.

Meaning of 'Property'

The problem of defining 'property' early arose in the United States in interpreting the Fifth Amendment to the Constitution.⁴⁷

Property is *nomen generalissimum* and it includes every species of valuable right and interest.⁴⁸ The concept of property has been expanded by the courts to include practically all rights which immediately or ultimately concern relations with respect to specific material objects.⁴⁹ Any right pertaining to land, whether it be real or personal, is property. The term 'property in lands' includes any usufructuary interest whether it be leasehold interest in premises for a definite term, for a tenant has a property in land.

Reference to English law is frequently made under which it means real as well as personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit of use in land of another, and choses in action.

Property is distinguished from ownership of property. As applied to land the meaning of the term 'property' is, as explained by writers on jurisprudence, ambiguous. It may mean either the land in relation to which rights of ownership exist, or it may refer to the rights of ownership which exist in relation to the land.⁵⁰

⁴⁶ Constitution (First Amendment) Act, 1951; Constitution (Fourth Amendment) Act, 1955; Constitution (Seventeenth Amendment) Act, 1964.

⁴⁷ The Fifth Amendment provides—"No person shall be deprived of property without due process of law, nor shall private property be taken for public use without just compensation."

⁴⁸ *Scruton v. Wheeler*, 179 US 141 at 170 (1900); *Corporation of Calcutta v. St. Thomas Schovol*, AIR 1949 FC 121.

⁴⁹ C. Reinold Noyes, *The Institution of Property*, 1st edition p. 378 (1936).

⁵⁰ Per Latham CJ of the Australian High Court in *Minister of State for the Army v. Dalziel*, 68 C. L. R. 261 at 276 (1944).

Ores and minerals contained in land are property. So also the owner's reservation of the minerals and the rights to mine the same, a right of way over the land for mining purposes and mining leases are regarded as property. A priority to the use of water is a property right which is the subject of purchase and sale. The right to fish is a property right. Leasehold interests in the tide-lands of the state are property. One creates property even by granting an exclusive right to hunt on game preserves. An equity in encumbered real estate remains property.⁵¹

The term includes a *bona fide* equitable interest in property of which the legal title is in another. A trust fund is property though the beneficiary cannot assign or convey or devise it. Property includes a mortgage, an equitable lien upon bonds and shares of stock. The right of pre-emption which is a right recognised by the Islamic Sharia Law is property.⁵²

Certain choses in action are conceded as property. The term includes credits. A debt is property. Property includes money. It includes a promissory note, bonds and a cheque. Outstanding uncollected accounts are property and so also is a judgment-debt. Contracts other than debts are also held to be property. A contract between a water-supply company and a city to supply

⁵¹ C. R. Noyes, *The Institution of Property*, at p. 378.

⁵² Pre-emption—The right of *Shufaa* or pre-emption is "a right which the owner of an immovable property possesses to acquire by purchase another immovable property which has been sold to another person". *Mulla, Principles of Muhammadan Law*. This right may be claimed by (a) a co-sharer in the property, (b) a participator in immunities and appendages, such as right of way or a right to discharge water, and (c) owners of adjoining possession of such property without any lawful title. This right is recognised by custom among Hindus in some places in the Indian sub-continent. It is obvious that the right of pre-emption restricts the rights of the owner to dispose of his property and the rights of the vendee to acquire any property. As Mahmood J observed, the objects behind the right of pre-emption in regard to urban immovable property were (1) the securing of quiet enjoyment of his own property by the pre-emption, and (2) exclusion of strangers to obviate the inconvenience or disturbance which would arise by their introduction. *Govind Dayal v. Inayatullah*, (1885) ILR 7 All 775 (FB).

water to it and contract rights transferred to a corporation in payment for stock are deemed to be property.

Property is frequently held to include a calling, business or profession. Thus the right to practise medicine is, like the right to practise any other profession, a valuable property right. There is some doubt whether the office of an attorney is his property or an extraordinary privilege.

The enjoyment of the property may be present or prospective or the right may be present or future. So, a vested remainder is property and also a vested interest in a contingent right, being more than a mere possibility.

Though a license is technically not property in the sense that it can be withheld without compensation, yet it is a valuable right and has all other attributes of property. The salary of an office which is earned during the term of office is a debt and as such property,⁵³ but the right to it depends on the right to office. Labour is property and the labourer has the same right to sell his labour and to contract with reference to it as any other property owner. Patents, trade-marks and copyrights are held to be property. An easement is property and specifically a right of way is property. The goodwill of a business is property. The right to an office which is held at the pleasure of the appointing authority does not constitute property.⁵⁴ The right to sue in respect of one's claim to property is itself a property.⁵⁵

The following objects are not considered as property: the domestic services of a wife which are regarded as purely personal to the husband, a claim for alimony made by a married woman, a slot-machine capable of use in violating the laws of the state, the moral, intellectual and social privileges of members of a fraternal order which are merely incidents of membership and a public office. So also a corporate franchise is a mere privilege or grant of authority by the government and is not property of any description.⁵⁶

⁵³ *Bombay Dyeing Co. v. State of Bombay*, AIR 1953 SC 328.

⁵⁴ *Collector v. Deshpande*, AIR 1964 SC 326.

⁵⁵ *Mahbub Begum v. Hyderabad State*, AIR 1951 Hydr 1 (FB).

⁵⁶ C. R. Noyes, *The Institution of Property*, at pp. 378-389.

In an Australian case the extent of the powers of the Commonwealth Parliament to acquire property under Section 51 (xxxi) in conjunction with the Commonwealth defence power was considered.⁵⁷ Here, the respondent conducted a parking station for motor cars on vacant land owned by the Bank of New South Wales under a weekly tenancy. The Minister for the Army required possession of the land for defence purposes and took possession of the land on a temporary but indefinite basis. Rich J of the Australian High Court in interpreting section 51 (xxxi) which, he said, contained "a provision of a fundamental character designed to protect citizens from being deprived of their property by the sovereign State except upon just terms", proceeded to define what is included in "property". He observed:

"The meaning of property in such connection must be determined upon general principles of jurisprudence, not by the artificial refinements of any particular legal system....Property, in relation to land, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle....Not only is object of the proprietary rights a tangible thing it is the most characteristic and essential of those rights."⁵⁸

In Dixon J's opinion, the word "property" used in the aforesaid section of the Australian Constitution covers not only

"Specific estate or interest in land recognized at law or in equity and... specific form of property in a chattel or chose in action similarly recognized, but that it extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession of property."⁵⁹

The views of the Indian judges as to the meaning of 'property' under the Indian Constitution are also worth consideration.

The word 'property' occurs in Articles 19(1) (f) and 31 of the Indian Constitution as is the case also in the corresponding provisions in Article 42 of the Constitution of Bangladesh wherein the word 'property' has been used twice as it has combined in it the provisions relating to the citizen's right to own property and

⁵⁷ *Minister of State for the Army v. Dalziel*, 68 C. L. R. 261. (1944)

⁵⁸ *Ibid.*, at p. 284.

⁵⁹ *Bank of New South Wales v. The Commonwealth*, 76 C. L. R. 1 at p. 349. (1948)

the State's power to take it over, whether it belongs to a person or a corporation, a citizen or a non-citizen.

While defining property Sastri CJ observed that it "must be understood both in a corporeal sense as having reference to all those specific things that are susceptible of private appropriation and enjoyment as well as in its judicial or legal sense of a bundle of rights which the owner can exercise under the municipal law with respect to the user and enjoyment of those things to the exclusion of all others."⁶⁰

The judges of the Indian Supreme Court, however, held different views as to the meaning of 'property' under the two different Articles, namely, Articles 19 (1) (f) and 31, of the Indian Constitution. As early as 1954, an attempt was made to distinguish between the citizen's right to own property and the right to property owned by him, or in other words, between his basic right to property which was recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country and the concrete rights of property.⁶¹

Here, a purchaser at a revenue sale brought a suit for ejecting under-tenure holders and got judgment against them in 1949. The Bengal Land Revenue Sales Act, 1859, gave such a purchaser the right to avoid all incumbrances and under-tenures, so that the auction-purchaser might bid for a higher amount that would cover the arrears of revenue. While the decree obtained by the

⁶⁰ *State of West Bengal v. Subodh*, AIR 1954 SC 92.

⁶¹ *Ibid.* In *Chiranjit Lal v. Union of India*, AIR 1951 SC 44 it was observed by Mukherjee J that the right to hold property as provided by Article 19 (1) (f) meant the right to possess it as well as to enjoy "all the benefits which are ordinarily attached to the ownership of property". In differing with the views expressed by Sastri CJ in *Subodh Gopal's* case Mukherjee J said that Article 19 (1) (f) applied equally to concrete as well as abstract rights of property. There is no reason, he said why the word 'property' as used in this Article should not be extended to those "well recognised types of interest which have the insignia or characteristics of proprietary right." Thus the ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant and the Mahant has the right to enjoy this property or beneficial interest as long as he holds his office. *Commissioner, Hindu Religious Endowments v. L.T. Swamiar*, AIR 1954 SC 282.

above-mentioned purchaser was still in the process of execution, the impugned Act was amended in 1950, by which amendment he was deprived of his right to avoid under-tenures. The question before the Court was whether the restriction imposed by the amendment related to property within the meaning of Article 19 (1) (f) and as such was unreasonable or the case was governed by Article 31 and there was, therefore, no necessity to determine whether the restriction was reasonable or not. As this right was regarded as falling within the purview of the concrete rights, it was considered as right to property guaranteed by Article 31. It did not conform to the right with regard to acquisition, possession and disposal of property which clearly came under Article 19(1)(f).

In the second *Sholapur* case,⁶² Das J, of the Indian Supreme Court, included mills, machineries, stocks of the respondent company and the benefits or agreements of persons having contracts with the company within the term 'property' used in Articles 19 (1) (f) and 31. He had, however, some doubts as to whether the office of Managing Agents or of the directors, though each of such offices carried substantial remuneration, was 'property' so that it could be acquired or taken possession or disposed of. It was also doubtful, he continued, whether apart from shares in a company, other valuable rights of the shareholders, for example, the right of voting, the right to elect directors and the right to apply for the winding-up of the company, were 'property' within the meaning of Clause (2) of Article 31, which corresponds to the second part of Clause (1) of Article 42 of the Constitution of Bangladesh, "for by itself and apart from the shares, none of them can be acquired or disposed of". The position of the right to receive dividend is the same.

Bose J said that a preference share-holder had an undoubted interest in the company and also a direct interest in the undertaking in which the company engaged, for, "property" included interest in any commercial or industrial undertaking as well as any interest in any company owning any interest in any commercial or industrial undertaking.

⁶² *Dwarkanadas v. Sholapur Spinning & Weaving Co. Ltd.*, AIR 1954 SC 119.

Ghulam Hasan J observed that "having regard to the setting in which Article 31 is placed, the word property used in the Article must be construed in the widest sense as connoting a bundle of rights exercisable by the owner in respect thereof and embracing within its purview both corporeal and incorporeal rights".⁶³

In the first *Sholapur* case⁶⁴, Mukherjee J, referring to the shareholders' rights arising out of the shares they possessed, observed that "...these rights or privileges which are appurtenant to or flow from the ownership of property, but by themselves and taken independently they cannot be reckoned as property capable of being acquired, held or disposed of."

They do not, therefore, constitute property. Das J also made similar observations (at page 62): "These rights...are, no doubt, privileges incidental to the ownership of the share which itself is property, but it cannot...be said that these rights themselves, and apart from the share are, property within the meaning of those articles." (Articles 19 and 31).

We have considered the various definitions of 'property' attempted by the judges of different countries and have seen the lack of a uniform approach to the expression. We feel inclined to agree with an American writer, who after treating property as an example of defective terminology, said:

"Both with lawyers and with laymen this term has no definite or stable connotation. Sometimes it is employed to indicate the physical object to which various legal rights, privileges, etc., relate, then again with far greater discrimination and accuracy the word is used to denote the legal interest (or aggregate of legal relations) appertaining to such physical object. Frequently there is a rapid and fallacious shift from the one meaning to the other. At times, also the term is used in such a 'blended' sense as to convey no definite meaning whatever."⁶⁵

The above definition of property involves two concepts, one is objective and the other is subjective. One tends to describe property as tangible physical object; the other refers to legal

⁶³ *Ibid.*, at p. 139.

⁶⁴ *Chiranjit Lal v. Union*, AIR 1951 SC at p. 57.

⁶⁵ Hohfeld, *Fundamental Legal Conceptions in Judicial Reasoning*, 23 Yale Law Journal, 16 at p. 28.

relations between a man and a certain physical object. The former concept of property is concerned with material substances, the latter with abstract conceptions.

In Roman law the use of the subjective concept was favoured. The word '*proprietas*' does not mean a material thing. It means a legal relationship with a material thing; the thing itself is "material".

Differences Between Restrictions to Hold Property and Deprivation Arising out of Acquisition of Property by the State.

While the first part of Article 42 of the Constitution guarantees the citizen's right to acquire, hold, transfer or otherwise dispose of property, subject to any restrictions imposed by law, the second part of the Article refers to compulsory acquisition, nationalisation, or requisition of property. Impliedly, if property is acquired, nationalised or requisitioned by the State, the owner of such property will be deprived of it. Article 32 of the Constitution of Bangladesh refers to deprivation of life or personal liberty. But the word 'deprived' does not occur in Article 42. In the corresponding provisions of the Constitution of Pakistan 1956 and 1962, the word "deprived" was used.⁶⁶

In some of the Indian cases the question arose whether the word "restriction" occurring in Clauses (2) to (6) of Article 19 of the Indian Constitution could be taken as extending to deprivation.⁶⁷ As early as 1950, the majority of the judges of the Indian Supreme Court held that "restriction" did not mean "deprivation".⁶⁸ They were, however, considering the Constitutional bearing of the preventive detention laws with reference to Articles 19 and 22 of the Indian Constitution.⁶⁹

⁶⁶ Both in Article 15, Constitution of Pakistan, 1956 and Fundamental Right No.14, Constitution of Pakistan, 1962 it was provided that "No man shall be deprived of his property save in accordance with law".

⁶⁷ The word "restriction" is employed in Articles 36 to 40, 42 and 43 of the Constitution of Bangladesh.

⁶⁸ *A.K.Gopalan v. State of Madras*, AIR 1950 SC 27.

⁶⁹ Articles 36 to 40 and 42 of the Constitution of Bangladesh correspond to Article 19 of the Indian Constitution and Articles 32, 33 and 35 of the Constitution of Bangladesh correspond to Articles 20 to 22 of the Indian Constitution.

Kania CJ observed, "Deprivation of personal liberty has not the same meaning as restriction of free movement in the territory of India".⁷⁰

Sastri J, as he then was, said:

The use of the word "restrictions" in the various sub-clauses seems to imply, in the context, that the rights guaranteed by the Article, are still capable of being exercised, and to exclude the idea of incarceration though the words "restriction" and "deprivation" are sometimes used as interchangeable terms, as restriction may reach a point where it may well amount to deprivation."⁷¹

Fazl Ali J, however, in his dissenting judgment, took the view that "restrictions" might include total deprivation. He said:

".....restriction would be the most appropriate expression to be used in Clause (5) so as to cover all those forms ranging from total to various kinds of partial deprivation of freedom of movement."⁷²

In a later case which considered the meaning and scope of Clause (5) of Article 19 of the Indian Constitution, Das J, of the Indian Supreme Court, said:

".....surely one and the same word 'restriction' used in one and the same Clause (5) cannot have one meaning in its application to sub-clauses (d) and (e) and a different meaning and connotation in its application to sub-clause (f)".⁷³

Some consideration and the relationship between the two parts of Clause (1) of Article 42 of the Constitution of Bangladesh may, therefore, seem appropriate. The right guaranteed by the first part of Clause (1) of the Article is available to the citizen only, whereas the second part of the same clause guaranteed the right to property to all persons, whether citizens or non-citizens, against acquisition, nationalisation or requisition. The former refers to restriction, while by implication the latter which mentions that no acquisition of property can be effected save by the authority of law, means deprivation. In spite of the

⁷⁰ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 at p. 37.

⁷¹ *Ibid.*, at p. 69.

⁷² *Ibid.*, at p. 51.

⁷³ *State of West Bengal v. Subodh*, AIR 1954 SC 92 at p. 109. This clause in the Indian Constitution corresponds to Article 36 and the first part of Clause (1) of Article 42 of the Constitution of Bangladesh.

narrow differences (this would appear to be due to the omission of the restrictive word 'reasonable' before 'restrictions') between the rights so guaranteed by Clause (1) of Article 42, comparison between them is somehow inevitable and the discussion of the effect of the one on the other would seem quite plausible.

If, due to the replacement of the word 'reasonable' by 'any' before 'restrictions', the power to impose restrictions under the first part of Clause (1) of the Article is extended to cover the cases of deprivation, though it does not fall within the scope of the second part of the same clause, there would, it may be contended, be hardly any difference between 'restrictions' and 'deprivation'. The question may, therefore, arise: Does the citizen to whom the fundamental right was guaranteed by the first part of Clause (1) of Article 42 retain his property over or with respect to which alone that right might be exercised or he may be totally deprived of the property? In answering a similar question with reference to the corresponding sub-clause (f) of Article 19 (1), one of the judges in *Gopalan's* case drew the conclusion that it pre-supposed that the citizen must retain his property so that he might exercise the right guaranteed by that Article. He, thus, observed:

"But suppose a person loses his property by reason of its having been compulsorily acquired under Article 31 he loses his right to hold that property and cannot complain that his fundamental right under sub-clause (f) of Clause (1) of Article 19 has been infringed. It follows that the rights enumerated in Article 19 (1) subsist while the citizen has the legal capacity to exercise them. If his capacity to exercise them is gone, by reason of a lawful conviction with respect to the rights in sub-clauses (a) to (e) and (g), or by reason of lawful compulsory acquisition with respect to the right in sub-clause (f), he ceases to have those rights while his incapacity lasts."⁷⁴

The same observations were made by the same learned judge in the case of *Chiranjit Lal v. Union* on the correlation between Article 19 (1) (f) and Article 31 which correspond to Clauses (1) and (2) of Article 42:

"The right to property guaranteed by Article 19 (1) (f) would likewise continue until the owner, was under Article 31, deprived of such property by authority of law"⁷⁵

⁷⁴ Per Das J in *A.K.Gopalan v. State of Madras*, AIR 1950 SC 27 at p.113.

⁷⁵ *Chiranjit Lal v. Union*, AIR 1951 SC 41 at p.60.

He reiterated the same opinion in *State of West Bengal v. Subodh*⁷⁶.

The above views were not, however, shared by the other judges. Thus, while asserting that no question of correlating Article 19 (1) (f) with Article 31 could arise on the analogy of *Gopalan's* case, Sastri CJ said:

“.....under the scheme of the (Indian) Constitution, all those broad and basic freedoms inherent in the status of a citizen as a free man are embodied and protected from invasion by the state under clause (1) of Article 19, the powers of state regulation of those freedoms in public interest being defined in relation to each of those freedoms by clauses (2) to (6) of that Article, while rights of private property are separately dealt with and their protection provided for in Article 31, the cases where social control and regulation could extend to the deprivation of such rights.....”⁷⁷

It may, however, seem apparent that the first part of Clause (1) of Article 42 contemplates the existence of a property which can be enjoyed and over which rights can be exercised. How could the question of putting restrictions on the exercise of the right to acquire hold, transfer or otherwise dispose of property arise if one is totally deprived of it. If under the garb of imposing restrictions the property is acquired “there is no property in respect of which the petitioner can claim the fundamental right to acquire, hold or dispose of it nor can there be any occasion for placing any restriction on such a right.”⁷⁸

The first part of Clause (1) of Article 42 deals with the right to freedom guaranteed to all citizens. This right to freedom is a

⁷⁶ AIR 1954 SC 92 at p.106.

⁷⁷ *State of West Bengal v. Subodh*, AIR 1954 SC 92 at p.96. In *Swami Motor Transport Ltd. v. Sankara Swamigul*, AIR 1962 SC 864, it was held that unless the reasonableness of a law depriving a citizen of his property were established, it would offend the constitutional guarantee of a citizen to hold and dispose of his property, thereby impliedly meaning that deprivation was a form of restriction. This view was reiterated in *Rustom Cavasjee Cooper v. Union of India*, AIR 1970 SC 564. Earlier, in *Kochuni v. State of Madras and Kerala*, AIR 1960 SC 1080, Subba Rao J had observed that in certain circumstances which must, however, show the reasonableness of the restrictions, the State has power to deprive a citizen of his rights to property.

⁷⁸ *R.L. Aurora v. State of U.P.*, AIR 1958 All 126 at pp. 132-133.

personal right and does not appear to include the power to acquire the property of a citizen. While, on the other hand, under the second part of Clause (1) of Article 42 the State may compulsorily acquire, nationalise or requisition a person's property. The property is thus transferred to the State. The first part of Clause (1) of Article 42 does not seem to control the latter part of the same clause.⁷⁹

Neither the former nor the latter part of Article 42 of the Constitution of Bangladesh on its true construction was intended to prevent wrongful individual acts or to provide protection against merely private conduct. In establishing this proposition with reference to Article 19 (1) (f) of the Indian Constitution, the Indian Supreme Court observed that the violation of rights of property by individuals was not within the purview of the former Article for "the language and structure of Article 19 and its setting clearly show that the article was intended to protect those freedoms against state action other than in the legitimate exercise of its powers to regulate private rights in the public interest."⁸⁰

Recently, in one of the earliest cases before the Supreme Court of Bangladesh, the constitutionality of three newly enacted statutes was challenged.⁸¹ In deciding upon the questions raised, the Court had to consider the scope and extent of the citizen's rights to property guaranteed by Article 42 of the Constitution⁸². In justification of the constitutionality of the impugned statutes it was broadly argued that they did not infringe the provisions of Article 42, because the word "restrictions" used in the Article was "wide enough to include within it complete

⁷⁹ *Kochuni v. State of Madras*, AIR 1960 SC 1080 at p.1092; *Barkaya v. State of Bombay*, AIR 1960 SC 1203.

⁸⁰ *P.D.Shamdasani v. The Central Bank of India*, AIR 1952 SC 59.

⁸¹ President's Order No.88 of 1972, President's Order No.136 of 1972 and President's Order No.24 of 1973. The first of these Orders, by inserting a new section, Section 95A, to the State Acquisition and Tenancy Act, 1950 sought to amend Section 95 of the same Act which regulates the raiyat's dealing of his land by way of usufructuary mortgage. The latter two Orders further amended Section 95A.

⁸² *Ali Ekabbar Farazi v. Bangladesh*, (1974) 26 DLR 394. The judgment of the Court was delivered on July 24, 1974.

deprivation of one's right to property and also total prohibition of the exercise of such a right". Bhattacharaya J, who delivered the judgment, expressed his inability to support such extremely restrictive views of the citizen's right to property. Notwithstanding the easily perceptible dissimilarity between the provisions of the first part of Article 42 and those of Article 19 (1) (f) of the Indian Constitution (the main difference, as already mentioned, being the omission of the word 'reasonable' before the word 'restrictions' in Article 42) and in spite of the rejection of several decisions of the Indian Supreme Court which were relied upon to uphold the restrictive views, the Government contention that Article 42 excluded judicial review and further that the guarantee provided in the first part of the Article was merely against executive action and not against any Legislative invasion upon such a right was not accepted by the Court. In the words of Bhattacharya J,

"If this contention were correct, then the Constitution makers should have merely used the words "subject to law" instead of "subject to any restrictions imposed by law", and these additional words would be considered as mere surplusage. This will, however, be contrary to one of the established canons of interpretation.

Secondly, if the first part of the clause is construed in the manner suggested by the learned Additional Attorney General, the second part of the said clause will appear to be absolutely redundant, because if a citizen's right to property can be taken away by making a law under the first part, then what was the necessity for declaring in the second part of the said clause that no property shall be acquired, nationalised or requisitioned save by making a law? The provision of Clause (2) of Article 42 which deals with the case of compulsory acquisition, nationalisation or requisition will appear, upon the aforesaid construction of the first part of the clause, to be useless verbiage."

The conclusions reached by Bhattacharya J were that "the provisions of Article 42 (1) deals with the different subject matters: in the first part, the fundamental right of every citizen to acquire, hold and dispose of his property is declared but it is also provided that restriction may be imposed upon the exercise of such a right by law. The second part deals with the complete deprivation of the right to property as has been declared in the first part, as a result of the compulsory acquisition, nationalisation or requisition. The 'restriction' contemplated in the first part must be different

from the consequential legal incidence of complete extinction or near extinction which occurs because of the acquisition, nationalisation or requisition, as contemplated in the second part."

The State's Power to Acquire Property : Protection Against Expropriation : Doctrine of Eminent Domain.

Article 42 of the Constitution of Bangladesh delimits the State's power to deprive any person, whether a citizen or non-citizen, of his property. The second part of Clause (1) of the Article formulates the fundamental right in a negative form prohibiting the compulsory acquisition, nationalisation or requisition or property save by authority of law. Speaking affirmatively, it implies that property can be so acquired, nationalised or requisitioned, if there is a law authorising such action. Clause (2) of the Article imposes two limitations on the State's power to expropriate. Firstly, the law under which any property is compulsorily acquired, nationalised or requisitioned should provide for payment of compensation to the expropriated owner, but Parliament has been given the option not to provide any compensation, and, secondly, the law, when it provides for payment of compensation, must specify the principles on which compensation is to be given. Since the clause has expressly excluded the principle of judicial review, the adequacy of compensation cannot be determined by a court of law.

Subject to these limitations, Article 42 seeks to protect the right of property of every person, and not to declare the right of the State to deprive a person of his property.⁸³

Encroachment by the State upon private property is a consequence of the normal functioning of the various public services it has so far created. For the good of the public at large, every state practises expropriation in one form or another.

So far as indirect expropriation which arises from the normal functioning of public services is concerned, no great difficulty under Article 42 would be experienced. For example, a State's penal law is seen often to cause total or partial deprivation of the prisoner's property and other laws also prescribed pecuniary

⁸³ *State of West Bengal v. Subodh*, AIR 1954 SC 92.

penalties for the breach of their provisions. The system of taxation and the practice of monetary devaluation also interfere with the property of the citizens of a state, but they are not challenged as unconstitutional or affecting the citizen's property rights.

But difficulties are felt on a considerable scale when the state directly interferes with the property of its citizens. Under the heavy pressure of providing its citizens with various modern amenities of life, the state is frequently called upon to take possession of private property, moveable or immovable. In its extreme form expropriation manifests itself in the various measures of nationalisation. However, we shall proceed to examine the implications as well as the provisions of Article 42, rather than discuss the principles behind the socialist attitude to reorganise anew the economic forces operating at the present time.

As was observed in an Australian case, "One of the characteristic features of a fully sovereign power is its legal right to deal as it thinks fit with anything and everything within its territory."⁸⁴

In relation to its powers to deal with property this right, includes the powers of "eminent domain" i.e. the power of a sovereign state compulsorily to acquire, in accordance with law, on payment of compensation, the property of the citizens and non-citizens residing in the state, the 'police power' and the power of taxation.⁸⁵

The expression "*eminent dominium*" seems first to have been used by Grotius, in 1625. As understood by him, the power of eminent domain was limited morally, if not legally, to acquisitions for purposes of public utility and was subject to the liability to compensate the dispossessed owner.

⁸⁴ *Per Rich J as Minister of State for the Army v. Dalziel*, 68 C.L.R. 261 at p. 284 (1944); *U.S.v. Carmach*, 329 US 230 (1947).

⁸⁵ *State of West Bengal v. Subodh*, AIR 1954 SC 92 at 110. Section 51 (xxxii) of the Australian Constitution makes an express grant to the commonwealth Parliament of the power of Eminent Domain. Article 31 (2) of the Indian Constitution, Article 15 (2) of the Constitution of Pakistan, 1956 and Fundamental Right No.14 of the Constitution of Pakistan, 1962, contain express provisions for the State to exercise its power of Eminent Domain. In speaking of the power of Eminent Domain under the Indian Constitution, Mukherjee J of the Indian Supreme court, said:

The concept of eminent domain involves recognition of the principle of the juristic necessity of compensation to the person whose property is acquired for public purposes; this was recognised earlier in Roman law and the Code Napoleon.

The Fifth amendment to the United States Constitution is based on the assumption that the power of the eminent domain was inherent or implied, so no necessity was felt for granting express power to the legislature to make laws for acquiring land compulsorily. The power of eminent domain is inseparable from the sovereignty of the State and related to the "power of the Sovereign to take property for public use without the owner's consent". The State cannot contract away this right. For reasons of safety of the citizens, as, when a building is in a delapidated condition, or when fire is spreading, or for the preservation of health, the authorities may have to destroy property. Whether, in interpreting the provisions of Article 42, the Courts in Bangladesh would go by the plain words used by the framers of the Constitution or would concern themselves with the concepts of "eminent domain" and "police power" which may "make the task of interpretation more different" is yet to be seen.⁸⁶

If Article 42 will at all be considered as having conferred police power on the legislature in relation to rights of property and also as having made an express grant of the power of eminent domain, it should appear obvious that the first part of Clause (1) of the Article contains the police power of the State⁸⁷ while the second part of Clause (1) makes an express grant of the power of eminent domain, Clause (2) of the Article being only an elaboration of the second part of Clause (1).

⁸⁶ While construing the corresponding provisions of Articles 19 (1) (f) and 31 of the Indian Constitution the Judges of the Indian Supreme Court discussed these doctrines in *Chiranjit Lal v. Union*, AIR 1951 SC 41, and *State of West Bengal v. Subodh*, AIR 1954 SC 92.

⁸⁷ According to Sastri CJ of the Indian Supreme Court, the corresponding provisions in Article 19 of the Indian Constitution contains the police power of the state determining the regulative power of the Legislatures with respect to the freedom to acquire, hold and dispose of property.

The Meaning of "Acquired"

No Bangladesh decision has as yet considered the meaning of the word "acquired" used in Article 42 of the Constitution. But the controversy as to what was meant by the term "acquired" as occurred in Clause (2) of Article 31 of the Indian Constitution before its amendment in 1955 would seem to have been avoided by the framers of the Constitution of Bangladesh who, by specifically inserting the term "requisitioned" in Article 42, have attempted to ensure the same position as has been achieved under the Indian Constitution after the aforesaid amendment. The term "acquisition" means actual transference of property.⁸⁸ Thus, even under Section 299 of the Government of India Act, 1935 which conferred the power to acquire property, such infraction of the rights to property as the regulation of the relations of landlord and tenant and thereby diminishing rights, hitherto exercised by the landlord in connection with his land, was held to be different from compulsory acquisition of the land.⁸⁹

One of the cardinal rules of interpretation is, as has been observed elsewhere, to ascertain the meaning and effect of an enactment, Constitutional or otherwise, from the words used therein. If the words used acquired a technical or special meaning, that meaning must be given to them.⁹⁰

Keeping this principle in mind, Das J, of the Indian Supreme Court, in a dissenting judgment, rejected the view that "taking possession of or acquired" used in Article 31 (2) of the Indian Constitution (before the amendment in 1955) must be given the same wide meaning as "taken" in the corresponding provisions of the United States Constitution. Mention may be made that the words "taking possession of" do not occur in Article 42. While deprecating the line of reasoning which likened one thing with another and imputed the qualities of the other thing to the first-mentioned thing, the same learned Judge observed that to say that the expression "taking possession of or acquired" must be read as the American Courts have given to the word "taken"

⁸⁸ *Lal Singh v. C. P. and Berar*, AIR 1944 FC 61.

⁸⁹ *Jagannath v. United Provinces*, AIR 1946 PC 127.

⁹⁰ *State of West Bengal v. Subodh*, AIR 1954 SC 192.

is to ignore the entire historical background of the law relating to compulsory acquisition of property by the State.⁹¹

The controversy in the Indian Courts as to the precise meaning and scope of the term "acquisition" may, however, be briefly indicated.

While expressing the views that the word "acquired" must be given the special meaning which that word conveyed and could not be read synonymous with "taken" as used in the Fifth Amendment, Das J, of the Indian Supreme Court, said:

"Under the English law, on which more or less our modern laws are founded, the term "acquisition" has a special meaning. It connotes the idea of transfer of title, voluntary or involuntary. When the acquisition by the state is effected by agreement after negotiation there is a regular conveyance transferring the title from the vendor to the state. Even when the acquisition by the state is effected by the coercive process of exercising its sovereign power the idea of purchase is nevertheless present, for there is a vesting of the property in the state by operation of law". He said that the word "acquisition" should be treated as "a word of art having a long accepted legislative meaning implying the transfer of title."⁹²

Further, in expressing agreement with the definition of "acquisition" given by Mukherjee J in *Chiranjit Lal v. Union*, he said that "it cannot be disputed that acquisition means and implies the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that title might be. The entire bundle of rights which were vested in the original holder would pass an acquisition to . . . acquirer leaving nothing in the former".⁹³

Contrary to the opinion of Das J, Sastri CJ, of the Indian Supreme Court, said that the word 'acquisition' was not a term of art and it ordinarily meant coming into general sense that the

⁹¹ The words "taken possession of" or "acquired" have since been replaced by the words "compulsorily acquired or requisitioned" by the Constitution (Fourth Amendment) Act, 1955. By inserting Clause (2A) to Article 31, which was effected by the same amendment, the application of the American doctrine of "taken" in interpreting Article 31 (2) of the Indian Constitution has been excluded.

⁹² *State of West Bengal v. Subodh*, AIR 1954 SC 92.

⁹³ AIR 1951 SC 41.

word had been used and not as implying any transfer or vesting of title. He referred to an Australian case⁹⁴ in which the majority of the Full Bench of the High Court of Australia considered the scope of the legislative power with respect to "acquisition" of property conferred on the Commonwealth Parliament by Section 51 (xxx) of the Australian Constitution and decided that the power included the power to take possession of property for a temporary purpose for an indefinite period. Further, Sastri CJ said:

".....the word "acquisition" and its grammatical variations should in the context of Article 31, and the Entries in the Lists, referred to above, be understood in their ordinary sense and the additional words, "taking possession or" or "requisitioning" are used in Article 31 (2) and in the Entries respectively not in contradistinction with, but in amplification of the term "acquisition" so as to make it clear that the words taken together cover even those kinds of deprivation which do not involve the continued existence of the property after it is acquired. They would, for instance, include destruction which implies the reducing into possession of the thing sought to be destroyed as a necessary step to that end."

In the second *Sholapur case*⁹⁵, the Indian Supreme Court, preferred to follow the majority view in the Australian case as to the meaning of the word "acquisition" because, "it seems to me that it is more in consonance with juridical principle that possession after all is nine-tenths of ownership and once possession is taken away, practically everything is taken away and that in construing the Constitution it is the substance and the practical result of the act of the state that should be considered rather than its purely legal aspect." In expressing the inability to accept the narrow views that "acquisition" necessarily means acquisition of title in whole or part of the property, it was said:

"The word 'acquisition' has quite a wide concept, meaning the procuring of property or the taking of it permanently or temporarily. It does not necessarily imply the acquisition of legal title by the state in the property taken possession of."

⁹⁴ *Minister of State for the Army v. Dalziel*, 68 C.L.R.261 (1944)

⁹⁵ *Dwarkanadas v. Sholapur Spinning & Weaving Co. Ltd.*, AIR 1954 SC 119 at 129.

In an earlier case⁹⁶ Jagannaddhas, J expressed his unwillingness to accept the definition given by Das J, as he then was, to the words "acquisition" or "taking possession" meaning transfer of title or possession. In his opinion, the words or phrases appeared "to comprehend all cases where the 'title' or 'possession' is taken out of the owner and 'appropriated' without his consent by transfer or extinction or by some other process, which in substance amounts to it, the possession in this context meaning such possession as the nature of the property admits and which the law recognises as possession".

"This, he said, "seems to follow from the enumeration of the classes of property in Article 31 (2) to which it is applicable and also by reason of the broader consideration that from the point of view of the owner or possessor whose title or possession is appropriated every such act of appropriation stands on the same footing."⁹⁷

The above two decisions of the Indian Supreme Court established that the majority rejected the narrow meaning of the word "acquisition" which is transfer of the title from the owner and vesting the same in the state. The word, in their opinion, conveyed a more comprehensive meaning, that is, the procuring of property or taking of it permanently or temporarily by the state. These decisions stand superseded by the insertion of Clause (2A) to Article 31 which does no longer permit the Courts to adopt the extended view of the word "acquisition."⁹⁸

No question of payment of compensation would, therefore, arise unless any property has been taken by way of acquisition or requisitioning.⁹⁹

⁹⁶ *State of West Bengal v. Subodh*, AIR 1954 SC 92. A comparative study of the two decisions of the Indian Supreme Court was made in the case of *K.C.Venkata v. Madras*, AIR 1958 Mad 173 (FB).

⁹⁷ *Ibid.*, at p.118.

⁹⁸ Clause (2A) runs as follows : "Where a law does not provide for the transfer of the ownership or right of possession of any property to the State or Corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

⁹⁹ *Nageswara v. Andhra Pradesh, S. R. T. Corporation*, AIR 1959 SC 308 at p. 318

Article 42 has not conferred upon the State the power to appropriate private property but has provided certain safeguards against the exercise of this power.¹⁰⁰

In Pakistan, earlier views which expressed approval of the opinion that acquisition did not constitute requisition¹⁰¹ did not find favour with the Courts.¹⁰² Thus, Rahman CJ, of the Lahore High Court, observed :

“In my humble judgment there is no difficulty in construing the word ‘acquisition’ occurring in item 9 of list II of Schedule VII to the Constitution Act, as including ‘requisition’. In the context of immovable property, acquisition may be accepted as transference of the ownership rights to the acquiring authority, as contrasted with requisition which would vest a temporary right of use of the property in that authority. The right of possession is but part of the full right of ownership *Omne majus continet in se minus*—the greater contains the less—is a well known maxim of the law.”¹⁰³

In a later case, while recognizing the principle that widest possible construction should be given to the words used in a statute and that the general word must be extended to all ancillary and subsidiary matters, Shahabuddin J, of the Supreme Court of Pakistan, said:

“‘Acquisition’ is not a term of art and has, therefore, to be construed in its ordinary meaning, which covers in the context in which it is used the acquiring of all kinds of rights or interest in land. It does not necessarily imply the acquiring of proprietary rights though when contrasting such acquisition with that of a lesser kind of rights such as requisition, ‘acquisition’ is generally used to convey the obtaining of proprietary rights while requisition is confined to the mere taking of possession for a limited or unlimited period. But from this distinction it does not follow that they are entirely different concepts and cannot, therefore, reasonably be covered by the same expression. In decisions as well as statutes the term ‘acquisition’ has been used to include temporary occupation.”¹⁰⁴

¹⁰⁰ *State of Bihar v. Kameshwar*, AIR 1952 SC 252.

¹⁰¹ *Usman Bhai v. Pakistan*, PLD 1956 Sind 25. Similar views were expressed by Bhagwati J in *Tan Bug Taim v. Collector of Bombay*, AIR 1946 Bom 216.

¹⁰² *Reference under Section 12, Sind Courts Act*, PLD 1956 Kar 178.

¹⁰³ *Ibid.*

¹⁰⁴ *Muhammad Nur Hossain v. Province of East Pakistan*, PLD 1959 SC 470.

Meaning of "Compensation"

Compensation means the value in money of the property, or, in other words, it is the price paid to the owner for the loss of his property.¹⁰⁵

"The owner receives for the lands he gives up their equivalent, that is, that which they were worth to him in money. His property is, therefore, not diminished in amount but to that extent it is compulsorily changed in form."¹⁰⁶

Constitutions of various countries provide for payment of compensation whenever private property is taken by the State.¹⁰⁷ In imposing similar obligations Article 42 of the Constitution of Bangladesh has, as already seen, attempted a compromise between socialistic principles and those upon which the institution of private property is based. For, Parliament may appropriate any private property without paying even nominal compen-

¹⁰⁵ Nichols, *Eminent Domain*, Vol III, at p. 29 (1950)

¹⁰⁶ *In re Arbitration*, (1909) 1 KB 16 at p. 29.

¹⁰⁷ In the Fifth Amendment to the United States Constitution "just compensation" was provided for compulsory acquisition—"Nor shall property be taken for public use without just compensation." In the French Constitution, "Previous just indemnity" is provided for such acquisition of property on "just terms". Other Constitutions have also provided for compensation to be paid to the expropriated owner.

Section 299 of the Government of India Act, 1935, provided as follows:

- (1) "No person shall be deprived of his property save by authority law.
- (2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorising compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking...unless the law provides for giving compensation for the property acquired and either fixed the amount of compensation, or specifies the principles on which and the manner in which, it is to be determined and given."

Article 15 (2) of the Constitution of Pakistan, 1956 provided as follows:

"No property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation or specifies the principles on which and the manner in which compensation is to be determined and given."

Fundamental Right No. 14 (2) of the Constitution of Pakistan, 1962 which guaranteed the citizen's property rights contained the same provisions.

In India, after amendment of Clause (2) of Article 31 of the Indian Constitution by the Constitution (Fourth Amendment) Act, 1955 the adequacy of compensation has become non-justiciable.

sation, but if it so desires it may even provide for just compensation. Article 42 has at the same time aimed at reconciling the claim to legislative supremacy with that of the Constitution. For, though it is clear that the obligation to pay compensation for the compulsory acquisition of property or that the adequacy or reasonableness of compensation cannot be determined by the Courts, other questions relating to the exercise of the power to acquire or requisition property do not appear to have been ousted from the jurisdiction of the Courts, for, example, whether the compulsory acquisition took place under legislative authorisation,¹⁰⁸ or whether in a case where Parliament has provided for payment of compensation, it has failed to fix the amount or specify the principles on which the compensation is to be assessed and paid.¹⁰⁹ Further, though under Clause (2) of Article 42 no question can be raised if the law has not provided for payment of compensation or as to the adequacy of compensation where it has so provided, there seems to be no bar against challenging such law if it infringes some other provisions of the Constitution, such as those of Article 27.¹¹⁰

Some reference to the decisions, by the British, United States and Australian Courts as to discover the meaning of "compensation" under Article 42 of the Constitution of Bangladesh and other principles related to it may perhaps at times seem relevant.¹¹¹

¹⁰⁸ *Virendra v. State of U. P.*, AIR 1955 SC.

¹⁰⁹ *State of Rajasthan v. Nathmal*, AIR 1954 SC 307.

¹¹⁰ *Than Singh v. Union of India*, AIR 1955 Punj. 55; *State of Bihar v. Kameshwar*, AIR 1952 SC 252.

¹¹¹ In *Fraser v. City of Fraserville*, (1917) AC 187, Lord Buckmaster for the Judicial Committee said "...the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its advantages and with all its possibilities, excluding any advantages due to the carrying out of the scheme for which the property is compulsorily acquired..." (at p. 194.)

Similar observations were made in *Atmaram v. The Collector of Nagpur*, (1929) 33 CWN 458 (PC)

In *Vyricherla v. The Revenue Divisional Officer*, (1939) 66 IA 104, the Judicial Committee held that "the value to be ascertained is the price that would be paid by a willing purchaser to a willing vendor, and not the price

As the assessment of compensation involves the determination of the question which affects the rights of subjects, it is a judicial function.¹¹²

In the United Kingdom, where land is compulsorily acquired a series of statutory provisions besides judicial decisions laid down the principles governing the compensation payable.¹¹³

The principal statutes are the Land Clauses Consolidation Act, 1845, the Acquisition of land (Assessment of Compensation) Act, 1947.¹¹⁴

that would be paid by a 'driven' purchaser to an unwilling vendor." The Supreme Court of the United States has decided in a number of cases that compensation must be a full and perfect equivalent for the property taken.

"The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. The owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value. Interest at a proper rate is a good measure by which to ascertain the amount so to be added" *Jacobs v. United States*, 290 US 13 at p. 16 (1933).

"We must presume that Congress in the passage of the Act of 1918 intended to secure to the owner of the patent the exact equivalent of what it was taking away from him." *Richmond Screw Anchor Co. v. United States*, 275 US 331 at p. 345 (1928).

Compensation should be assessed by a judicial tribunal. *United States v. Jones*, 109 US at pp. 518-520 (1883); *Monongahela v. United States* 148 US at pp. 324-327 (1893); *Seaboard Air Line Railway Co. v. United States*, 261 US at p. 304 (1923). No question as to fairness or adequacy of the compensation payable would arise if the parties had agreed upon the amount of compensation. *Albrecht v. United States*, 329 US 599 at p. 603 (1947).

In Australia, the Commonwealth Parliament cannot, under Section 51 (xxxi) of the Constitution, exercise its legislative power of acquisition unless the terms are just. *Minister of State for the Army v. Dalziel*, 68 C. L. R. 261 (1943-44); *Andrews v. Howell*, 65 C. L. R. 255 at 282 (1941).

¹¹² *Rex v. Hendon Rural District Council*, (1933) 2 KB 696 at p. 704.

¹¹³ Lawrence, *Compulsory Purchase and Compensation*, at p. 61.

¹¹⁴ In the United Kingdom, the principles of assessment as established under the Lands Clauses Act are worth consideration.

In Bangladesh, provisions relating to payment of compensation are contained in the Land Acquisition Act, 1894, and the Emergency Requisition of Property Act, 1948.

An expropriated owner must, if he is treated justly, be entitled to obtain the value of his property as at the date of acquisition.¹¹⁵ Latham CJ, of the Australian High Court, observed that this argument took a narrow view of the powers of Parliament under Section 51 of the Australian Constitution. He said :-

“Section 51 (xxxi) empowers Parliament to enact legislation providing a method of acquiring property and imposes upon Parliament

Compensation for land taken should include—as part of the purchase price of the land—compensation for disturbance and other loss suffered by the owner in consequence of the acquisition. *Horn v. Sunderland Corporation*, (1941) 2 KB 26. Service of notice to treat determines not only the property to be taken, but also the nature and extent of the owner's interest in it, and the date at which the interest is to be valued. *Penny v. Penny*, (1868) L. R. 5 Eq. 227. No compensation is payable in respect of fresh interests created after service of notice to treat. *Edwards ex parte* (1871) L. R. 12 Eq. 389. But if the owner can prove that he has suffered loss between the date of service of the notice to treat and the date which compensation is assessed, he may include this loss in his claim. *Granwell v. The Mayor of London*, (1870) L. R. 5 Ex. 284.

In the case of lessees, a legal right to the renewal of the lease forms part of the value of the leasehold interest. *Bogg v. Midland Rail Co.* (1867) L. R. 4 Eq. 310. But the mere possibility of a lease being renewed is not a legal right existing at the date of the notice to treat and cannot be the subject of compensation. *Ex parte Nadin*, (1868) 17 L. J. Ch. 421.

Any covenants affecting the land must be considered in assessing compensation, whether their effect is to increase or decrease the value of the land. *Penny v. Penny* (1868) L. R. 5 Eq. 227. But, while due regard must be had to all restrictions on the land, the possibility of the removal of those restrictions must also be kept in view. *Gorrie v. Mac Dermott*. (1914) AC 1056. In no case may compensation be based on the value of the land to the acquiring body. *Ibid.* Any increase in value consequent on the execution of the undertaking for, or in connection with which, the purchase is made must be disregarded. *South Eastern Rail v. L. C. C.* (1915) 2 Ch. 252.

It may be mentioned that the Acquisition of Land Act, 1919, did not repeal the provisions of the land Clauses Acts but in all cases to which the former Act applies, the above principles of compensation are to be regarded as subject to the provisions of the Acquisition of land Act, 1919.

¹¹⁵ *Grace Brothers Pty. Ltd. v. The Commonwealth*, 72 C. L. R. 269 (1946).

the necessity of providing just terms for the acquisition of property. Payment of the value of the property at the time of acquisition would doubtless be a basis of compensation in most cases, but there might be particular cases in which it could reasonably be contended that the payment of the value as at that date was not entirely just....Justice involves consideration of the interests of the community as well as of the person whose property is acquired."¹¹⁶

In the same case, Dixon J said that the condition "on just terms" was included to prevent arbitrary exercise of the power at the expense of a State on the subject.¹¹⁷

Article 42 of the Constitution of Bangladesh provides not 'just compensation' to be paid to the expropriated owner but 'compensation' whose amount may be fixed by the law acquiring property compulsorily or the law may specify the principles on which and the manner in which it is to be determined and given. Parliament may not, if it so thinks, provide for payment of any compensation, but if it provides compensation the principles according to which compensation will be paid must be determined by itself. Parliament may, however, delegate the power to apply such principles to the Executive.¹¹⁸

Though Clause (2) of this Article has excluded judicial review in respect of adequacy of compensation, the question may still arise whether Parliament, providing the principles for determining compensation, should lay down such standard as may be considered relevant to the property acquired or to the value of the property at or about the time it is acquired.¹¹⁹

¹¹⁶ *Ibid.*, at p. 279-280.

¹¹⁷ *Ibid.*, at p. 291.

¹¹⁸ *State of Bihar v. Kameshwar*, AIR 1952 SC 252.

¹¹⁹ *Vajravelue v. Special Deputy Collector*, AIR 1965 SC 1017; *Union of India v. Metal Corporation of India*, AIR 1967 SC 637.

CHAPTER ELEVEN

CONCLUSION

Recent Amendment Relating to Enforceability of Fundamental Rights

Since this book was sent to the press, two very significant events have taken place which have had significant consequence upon the operation and enforcement of the fundamental rights. One is the Proclamation of Emergency throughout the country on December 28, 1974 whose effect, however, is bound to be short-lived.¹ As a consequence of this Proclamation an order was passed on the same day suspending most of the fundamental rights and also their enforcement in a court of law during the continuance of the emergency.² Reference as to the effect of the suspension of fundamental rights or their continuity and enforcement was made in as early as the first chapter of this book. As soon as the emergency ends, these rights will be revived.

The other event which is of a permanent nature is the enactment of the Constitution (Fourth Amendment) Act, 1975 on January

¹ Proclamation of Emergency—"Whereas the President is satisfied that a grave emergency exists in which the security and economic life of Bangladesh are threatened by internal disturbance;

Now, Therefore, in exercise of the powers conferred by Clause (1) of Article 141 of the Constitution of the People's Republic of Bangladesh, the President is pleased hereby to issue this Proclamation of Emergency."

² Order—"In exercise of the powers conferred by Clause (1) of Article 141 C of the Constitution of the People's Republic of Bangladesh, the President is pleased hereby to declare that the right of any person to move any court for the enforcement of the rights conferred by Articles 27,31,32,33,35,36,37,38,39,40,42 and 43 of that Constitution, and all proceedings pending in any court for the enforcement of the said rights, shall remain suspended for the period during which the Proclamation of Emergency issued under Clause (1) of Article 141A thereof on the 28th December, 1974, is in force."

25, 1975. So far, however, the changes effected by the Fourth Amendment to the Constitution relate to the enforcement of the fundamental rights, its unusualness is as attractive as it is full of significance, if not for any other reason, at least for introducing a unique and unprecedented departure from the normal constitutional pattern followed elsewhere. As mentioned earlier in this book, under unamended provisions of Articles 44 and 102 of the Constitution, any citizen or, in some cases, any person aggrieved by an infraction of any of the fundamental rights could move the Supreme Court for the necessary relief.³ Besides, being in conformity with the constitutional principles followed in countries which declared similar rights in their Constitutions, the provisions relating to enforcement of fundamental rights by the Supreme Court as originally incorporated in Articles 44 and 102 of the Constitution were considered necessary for three reasons, namely, rights of citizens declared under the Constitution should, in fitness of things and in accord with constitutional propriety, be adjudicated upon by one of the principal organs of government, namely, the highest tribunal, the Supreme Court of Bangladesh, for, in many cases involving the breach of fundamental rights the respondent against whom remedy would be sought is one or the other of the remaining two organs of the Government, namely, the Executive or the Legislature. Since the Constitution declared the fundamental rights, they are limitations on the powers of the Legislature as well as the Executive and whether such limitations have been transgressed by them required determination, by an independent and impartial body or tribunal, involving high policy considerations. Secondly, such adjudication by the highest tribunal in the country was preferred because it is likely to command respect both of the rulers and the governed, perhaps, quite understandably, more than any other tribunal or court set up under an Act of Parliament. Thirdly, such means of enforcement would ensure speedy remedy, the number of appeals against an order made by the Court would be minimised; under the unamended provisions of Articles 44 and 102 only one

³ *Supra* page 13, Chapter I and also page 18, Chapter II.

appeal from such an order lay to the Appellate Division of the Court, if leave to appeal was granted by it under Article 103 (3), or a certificate to appeal was granted by the High Court Division under Article 103 (2) of the Constitution.

Since it is outside the scope of this book, there is no need to go into reasons behind the new constitutional measures which provide for the creation of a separate or independent tribunal for the purpose of enforcing fundamental rights.⁴ It seems, however, that there is no plausible reason to doubt that the principles decided so far by the superior Courts in this country or elsewhere, regarding their scope and extent, or their meaning and significance will be respected by such tribunal or court. So long as the function of the tribunal or court to be set up under the amended Article 44 of the Constitution remains judicial and its composition is made up of persons with high judicial experience and knowledge and outlook, the validity of any fears as to the maintenance and enforcement of fundamental rights by such tribunal or court may not be countenanced. It may, however, be suggested that if such a body, by a further amendment, were made or formed a part of a new administrative division of the Supreme Court, the arrangement would seem not only desirable, but ideally perfect.

Mention may here be made of the wholesale replacement of Chapter IV of the Constitution of Bangladesh by the Constitution (Fourth Amendment) Act, 1975. Since the Constitution was originally based on a parliamentary form of government, this chapter dealing with the executive organ of the government required changes when, for reasons not foreseen at the time of framing the Constitution, preference was felt for the presidential form of government. This change in the relationship between the Executive and the Legislature will, however, have no effect on the nature and scope of the fundamental rights. One of the Articles included in this chapter, namely, Article 55 (2), which

⁴ After amendment, Article 44 of the Constitution provides as follows:—
“Enforcement of fundamental rights—Parliament may by law establish a constitutional court, tribunal or commission for the enforcement of the rights conferred by this Part.”

has now been substituted by Article 56 (1) was earlier considered by us.⁵ There, we made certain comments about the desirability of such provisions and though they are no longer valid since the provisions themselves do not exist any more, the main propositions which we formulated with regard to the nature and extent of the executive power of the government may still hold good⁶.

Comparative Study—A Necessity

We have seen the nature, value and substance of the various fundamental rights and the courts' role in maintaining, nourishing and preserving them against executive, legislative and even individual action that is not authorised by or under the Constitution. There may be occasions when these rights will be infringed by legislative or executive action, but the citizens can, by appropriate proceedings in the Courts, thwart any possible attempt to infringe them. At the same time it can hardly be forgotten that "it is the duty of the Court to be last, not first to give them up"⁷.

Nonetheless, it is still too early to observe the effect of the fundamental rights on the development of the people of Bangladesh. Perhaps their impact on their sense of freedom is yet too meagre, but the number of cases relating to the rights instituted in Courts of Bangladesh since the passing of the Constitution, though not numerous, unmistakably shows that it was already creating a new readiness to stand up for one's rights, and the necessity of the State to display a new caution in matters which may tend to prejudice the rights. As knowledge of the scope of the rights, and the means of their enforcement spreads, if the economic position of the citizen improves, an increase in the number of such cases may be reasonably expected, and the respect for the rights will grow. In the East, people in general do not

⁵ *Supra*, p. 47, Chapter III. Article 56 (1), as amended, provides as follows :—"The executive authority of the Republic shall vest in the President and shall be exercised by him, either directly or through officers subordinate to him, in accordance with this Constitution.

⁶ *Supra*, pp. 48-54, Chapter III.

⁷ Per Jackson J. in *Youngstown Sheet and Tube Co. V. Sawyer*, 343 US 579 (1952).

take a day to day interest in what government is doing. The cause may be due to widespread illiteracy or long foreign domination or it may be ascribed to the socio-religious background of their thought-processes or an apathy to physical action, for admittedly, the conduct of a law-suit is both arduous, expensive and involves considerable exertion.

Be this as it may, to the literate class at least the chapter of fundamental rights is the most important part of the Constitution. It is no doubt true that "by and large, protection of a fundamental right is a privilege of the comparatively well-to-do,"⁸ but still the process of infiltration of the notion of protecting one's fundamental rights by legal proceedings goes on and will slowly permeate every layer of the citizenry in Bangladesh. With the efflux of time one may reasonably hope that majority of Bangladesh citizens will believe and act on the belief that the Constitution of Bangladesh is "a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times, and under all circumstances"⁹.

A word or two is necessary to explain why in this book, so much reliance has been placed on Indian and Pakistan case-law to illustrate the working of the fundamental rights guaranteed by the Constitution of Bangladesh. Up to 1947 both India and Pakistan constituted one geographical and political unit ; since then the destinies of the two countries separated. The political division of the sub-continent did not stop there. With the emergence of Bangladesh as a new, sovereign, independent state on December 16, 1971 the former state of Pakistan was dissolved leading to further changes, both political and otherwise. But though politically they pursued different policies from the moment of their independence, their laws and constitutions (notwithstanding the differences in the structural patterns of their respective governments) are drawn from the same source, namely, the Government of India Act, 1935.

With regard to fundamental rights, though there are important differences between these Constitutions and the Constitution

⁸ Professor Alan Gledhill, *Fundamental Rights in India*, p. 129.

⁹ *Ex parte Milligan*, 4 Wall. (US) 2.

of Bangladesh, similarity is also for that reason no less conspicuous.

Indian authorities as well as authorities from other countries are not binding on the courts in Bangladesh but they were so long frequently cited and referred to by the courts as being of great persuasive force. Inevitably, the courts in Bangladesh, faced with constitutional problems, will turn to solutions found for the same or similar problems in the courts of this sub-continent and there is at present no evidence that the courts in Bangladesh were blindly following foreign precedents, avoiding original thought, or failing to make their own contributions to constitutional thought. In defining the scope of the principle of subjective satisfaction of the government, while considering the Supreme Court's power under Article 102 of the Constitution of Bangladesh in a recent case,¹⁰ the Supreme Court did not, as it might well have done, reproduce the propositions of the Indian Supreme Court in several decisions culminating in *Pushkar Mukherjee v. State of W.B.*¹¹, it rather preferred to accept the principles stated by the Supreme Court of Pakistan¹² which set admirable examples of judicial statesmanship, particularly in a regime which could by no means be called democratic. A case involving the citizen's liberty is, as it must be obvious, none too less delicate than embarrassing and at the same time there cannot be any greater occasion for holding the scales evenly than in such cases. Happily, for everyone concerned there is no indication from the cases of this nature so far decided (most of them are still unreported and, therefore, could not be used for incorporation in this book) of any deviation from the path of justice and rectitude. Even in the absence of any previous decision by its predecessor or any other Court in Pakistan which it could look to as offering guidance or which could be relied upon as a precedent, the Supreme Court of Bangladesh did not

¹⁰ *Mrs. Aruna Sen v. Govt. of Bangladesh*, (1975) 27 DLR 122.

¹¹ *Pushkar Mukherjee v. State of W. B.*, A I R 1970 SC 852.

¹² *Ghulam Jilani v. Govt. of Pakistan*, P L D 1967 SC 373; *Abdul Baki Baluch v. Govt. of Pakistan*, PLD 1968 SC 313; *Begum Agha Abdul Karim Shorish Kashmiri*, PLD 1969 SC 14.

hesitate to refuse to accept the Indian decisions in answering the question whether the word "restrictions" used in Article 42(1) of the Bangladesh Constitution meant, so far as it related to the citizen's right to acquire, hold, transfer or otherwise dispose of property, total or complete extinction of such right by any express enactment for achieving such purpose, or the expression implied that the reasonableness of any law of this kind may be examined by the Court. After duly considering the Indian decisions¹³ and comparing the language of Article 42(1) with the corresponding provisions of the Indian Constitution, the Court repudiated the principle that the word "restrictions" occurring in the Article was wide enough to permit complete deprivation of the citizen's right to property or the total denial of the exercise of such right. The Court expressed inability "to apply the principle enunciated in the decisions of the Indian Supreme Court regarding the construction of the word 'restrictions' as used in Article 19 of the Indian Constitution in construing the word 'restrictions' occurring in Article 42 of our Constitution". The reason for saying so is that "the two Constitutions, in spite of many similarities, have been differently drafted and different languages have been employed in declaring the fundamental rights and the guarantees in respect of them"¹⁴. In another case,¹⁵ the Supreme Court of Bangladesh, in determining the extent of the District Magistrate's power to prohibit meetings and processions under Section 144, Criminal Procedure Code, followed Indian decisions which went further than any Pakistani decision in protecting the citizens' right of assembly.

While on some of the fundamental rights explicit restrictions have been imposed, others such as the right to equality before the law and the equal protection of law are expressed in comprehensive terms, which obviously presuppose that the courts will define and limit their scope. The courts will tend to interpret

¹³ *Kochuni v. States of Madras and Kerala*, AIR 1960 SC 1080; *Swami Motor Transport Ltd. v. Sankara Swamigul*, AIR 1962 SC 864; *Rustom Cavasjee Cooper v. Union of India*, AIR 1970 SC 564.

¹⁴ *Ali Ekabbar v. Govt. of Bangladesh*, (1974) 26 DLR 394.

¹⁵ *Oali Ahad v. Govt. of Bangladesh*, (1974) 26 DLR 376.

them in the same manner as the courts of those countries in which similar rights exist have interpreted them. So though the judges in India and Pakistan have declared that "due process" clause of the American Constitution has found no place in Indian or Pakistan Constitution,¹⁶ yet in interpreting the "equal protection" clause in Article 27 of the Constitution of Bangladesh, the courts in Bangladesh may, like the courts in Pakistan, be obliged to import the American doctrine of procedural due process. Under this Article the scope of judicial review is very similar to that in the United States under the Fourteenth Amendment to the United States Constitution.

Similarly, the doctrines of "police powers" and "eminent domain" found in the United States Constitutional laws may have to be considered and the case-laws reviewed when the courts in Bangladesh will deal with the State's power to restrict or deprive a person of his property or a citizen's right to hold and dispose of property. But how far, in view of the curtailment of the rights to property, will the invocation of the doctrine of eminent domain by a citizen who is deprived of his property succeed, is, however, yet to be seen. In India, notwithstanding protests against invocation of this doctrine,¹⁷ it has not been found possible to avoid it.¹⁸

Where the expressions "save in accordance with law" have been used to qualify and restrict the right guaranteed, as in Article 32, it seems almost to take away the right in the same breath that it is granted. Will the expression exclude the scope of judicial review of legislative or executive action if those rights are interfered with under the provisions of any law which may be highly arbitrary, unjustified or oppressive? Or will the Court intervene to judge of the reasonableness of the measures under which the rights are proposed to be taken away? For example, if a law is passed to-morrow that all persons with beard shall be put into prison for two years, would the Court uphold its

¹⁶ *Gopalan v. Madras*, AIR 1950 SC 27.

¹⁷ *Ibid.*

¹⁸ See the judgment of Das J, in *Dwarkadas v. Sholapur S. & W. Co.* AIR 1954 SC 119.

validity if the persons affected thereby challenged the legislation? If the legislature were to substitute, for the procedure at present provided by the Code of Criminal Procedure for the trial of a criminal case, trial by ordeal or trial by battle, would that be within Article 32 of the Constitution of Bangladesh? The Indian Supreme Court has answered these questions in the affirmative.¹⁹

But the Indian Supreme Court has persistently declined to recognise any spirit supposed to pervade the Constitution, but not explicitly stated in it. It has, whenever possible, endeavoured to apply, to the interpretation of a constitutional provision,²⁰ the rules applicable to the interpretation of a statute.

It is expected that the courts of Bangladesh would, in due course, like their predecessors show signs of being willing to make a more liberal interpretation. The rule that constitutional provisions can be read into a statute, with whose express terms it is not inconsistent²¹ is not found in Indian Constitutional case law. If the Indian Courts were to interpret Article 41 of the Bangladesh Constitution²² in the same spirit as it interpreted the fundamental right to life and liberty, it would have accepted the argument that the right to practise religion could be taken away by law. The Supreme Court of Bangladesh would, perhaps, decline to see any merit in it, and may, like Chief Justice Munir,²³ feel that such a notion, was a fraud on the citizen, especially in regard to provisions designed to safeguard freedom of conscience; a law might regulate the manner in which religion may be practised, but could not interfere until profession invited breaches of the peace, or practice led to overt acts against public order.

Before conclusion, declaration of fundamental rights or their absence in a Constitution (India and the U.S.A. fall in the former and the U.K, Canada and Australia illustrate the latter phenomena) hardly makes any difference so far as the material or any other kind of progress of a State is concerned, if only the laws will be just and fairly administered the citizens of this country will have no cause for grievance.

¹⁹ *Gopalan v. Madras*, AIR 1950 SC 27.

²⁰ See Kania C. J., in *Gopalan v. Madras*, AIR 1950 SC 27.

²¹ *Behram Khan v. State*, PLD (1957) Kar 709.

²² Article 41 (1) "Subject to law, public order and morality—(a) every citizen has the right to profess, practise or propagate any religion;"

²³ *Jibendra v. East Pakistan*, PLD 1957 SC 9.

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